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Supreme Court, U.S.
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No. _____

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In The

Supreme Court of the United States

FRANKLIN RODRIGUEZ DELGADO, ET AL.,

Petitioners,

v.

SHELL OIL CO., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

To gain access to federal court, defendants in a state court action filed third-party complaints against an entity asserted to be a "foreign state" within the meaning of the Foreign Sovereign Immunities Act. The entity was never a party to the state court actions. After these filings, that entity removed the actions to federal court, where defendants obtained dismissal on the basis of a federal defense not available in state court.

This case raises two questions that warrant review by this Court:

1. Whether an entity, a majority of whose shares are owned not by a foreign state but by an agency or instrumentality of a foreign state, should itself be deemed to be a foreign state under 28 U.S.C. §1603(b)(2) – a question on which the lower courts are divided; and

2. Whether the court of appeals departed from recent and controlling authority of this Court, in holding that an entity need not be a party to a state court proceeding before removing it to federal court.

LIST OF PARTIES

The named petitioner, Franklin Rodriguez Delgado, was the named plaintiff in one of the cases consolidated below. The other petitioners are approximately sixteen thousand individuals who were also named plaintiffs in one of the consolidated cases. One of the cases below, *Jorge Colindres Carcamo, et al. v. Shell Oil Co., et al.* was filed as a putative class action, but certification was never ruled upon. For this reason, the phrase "Franklin Rodriguez Delgado, individually and on behalf of all others similarly situated" appears in the caption of the court of appeals' decision.

The record contains the names of each petitioner. Their names are omitted here in the interest of brevity, but can be supplied to the Court promptly upon request.

The respondents are Shell Oil Co., Dow Chemical Co., Occidental Chemical Corp., Standard Fruit Co., Standard Fruit and Steamship Co., Dole Food Co., Dole Fresh Fruit Co., Chiquita Brands, Inc., Chiquita Brands International, Inc., Del Monte Tropical Fruit Co., Del Monte Fresh Produce, N.A., Dead Sea Bromine Co, Ltd., and Ameribrom, Inc., defendants and third-party defendants in the district court.

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OPINIONS BELOW

The decision of the United States Court of Appeals for the Fifth Circuit is reported as *Franklin Rodriguez Delgado v. Shell Oil Co.*, 231 F.3d 165 (5th Cir. 2000), and is reproduced in the Appendix at 1-39. The district court opinions are reported at 890 F.Supp. 1315 and 890 F.Supp. 1324, and appear in the Appendix at 40-59, 60-172.

JURISDICTION

The judgment of the court of appeals was entered on October 19, 2000. The court denied a timely motion for rehearing on November 16, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

28 U.S.C. §1603, the definitional provision of the Foreign Sovereign Immunities Act, provides in pertinent part:

> (a) A "foreign state," except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity . . .
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. §1441 provides in pertinent part:

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or defendants, to the district court of the United States for the district and division embracing the place where such action is pending. . . .

(d) Any civil action brought in a State court against a foreign state as defined in section 1603(a) of this title may be removed by the foreign state to the district court of the United States for the district and division embracing the place where such action is pending . . . .

STATEMENT OF THE CASE

Petitioners respectfully seek a writ of certiorari to the United States Court of Appeals for the Fifth Circuit. That court affirmed dismissals entered in several cases that had been consolidated at the district court level and on appeal. App. 5, 9, 14.

Petitioners are workers on banana plantations in several foreign countries. They sued most of the respondents in various state courts in Texas. Other respondents were later impled as third-party defendants.

Petitioners alleged they had been sterilized as a result of occupational use of a pesticide made or used by the respondents. Respondents Shell Oil Co., Dow Chemical Co. and Occidental Chemical Corp. were alleged to

have made and sold the pesticide; respondents Standard Fruit Co., Standard Fruit & Steamship Co., Dole Food Co., Inc., Dole Fresh Fruit Co., Chiquita Brands, Inc., Chiquita Brands Int'l. Inc., and Del Monte Tropical Fruit Co. were alleged to have required petitioners to use it while employing petitioners on their banana plantations. Petitioners alleged that both groups of respondents knew of the hazards of the pesticide, and that they continued to sell and use it after the Environmental Protection Agency banned its use in this country because it caused sterility and cancer.

The choice of Texas state court was not an accident. Two of the respondents, Shell Oil Co. and Occidental Chemical Corp., have their world headquarters in Texas. A third, Dow Chemical Co., has its largest facility there. Texas also did not recognize the doctrine of forum non conveniens at the time the suits were filed.

Most of the cases were removed and remanded once. E.g. *Rodriguez v. Shell Oil Co.*, 818 F.Supp. 1013 (S.D. Tex. 1993); App. 8. Unable to remove the cases on any normal basis, respondents decided to implead a putative third-party defendant – an Israeli company which was asserted to be a "foreign state" within the meaning of the Foreign Sovereign Immunities Act. This third-party defendant, respondent Dead Sea Bromine Co. ("Dead Sea"), was not owned by the State of Israel. Instead, it was a second-tier subsidiary of a company owned by the State of Israel.

Respondents had no true interest in contribution or indemnity from Dead Sea. Instead, they wanted to use Dead Sea as a procedural weapon, to facilitate removals that were otherwise barred. As an asserted foreign sovereign, it could remove not only the third-party claims

brought against it, but also the petitioners' underlying claims against the primary respondents.

The respondents in the state cases secured Dead Sea's cooperation in advance, before filing the ostensible third-party claims against it. This cooperation is evidenced by, among other things, the simultaneous filing of the third-party complaints and the resulting removals.

The first removal occurred in the *Delgado* case in Galveston County, Texas.

On March 15, 1994, respondent Del Monte Fresh Produce, N.A. served a third-party claim upon respondent Dead Sea. Dead Sea removed the entire case the same day. App. 9. Petitioners were never served with Del Monte's third-party action until well after the removal occurred.

In light of the respondents' impleader of Dead Sea, and in view of petitioners' knowledge that Dead Sea played no role in causing their injuries because its product was virtually never sold in petitioners' countries, petitioners amended their pleadings in other state court actions to specifically disclaim recovery of any damages attributable to any act, omission or product of Dead Sea. App. 87. The point of these amendments, of course, was to eliminate any derivative third-party claim against Dead Sea. E.g., *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 320 (Tex. 1994) ("[A] person is not liable to a defendant for contribution if he is not also liable to the plaintiff."). Petitioners assumed that the defendants would bring motions in the state courts, under Tex. R. Civ. Proc. 38, for leave to serve Dead Sea with third-party complaints.

Tex. R. Civ. Proc. 38(a) is similar to Fed. R. Civ. Proc. 14(a), in that it provides a time period – 30 days after

answering, as opposed to ten under the federal rule – in which a defendant may implead a third party without leave of court. After 30 days, the Texas rule requires that a defendant "must obtain leave on motion upon notice to all parties to the action." Petitioners wished to avoid the impleader of Dead Sea, and believed that the elimination of any third-party liability on Dead Sea's part would weigh in favor of denial of such motions.

Petitioners did not anticipate, however, the orchestration of pleadings that next occurred. These carefully choreographed maneuvers resulted in the normal state court scrutiny of third-party petitions being circumvented. Here is Dead Sea's own description of the removal machinations in one case:

> On April 5, 1994, defendant The Dow Chemical Company ("Dow"), filed a third-party petition against Dead Sea Bromine and Ameribrom, Inc. ("Ameribrom"). Dead Sea Bromine, which is an "agent or instrumentality" of the State of Israel within the meaning of Section 1603(b) of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1603(b), immediately removed the action to this Court under 28 U.S.C. §1441(d). The Notice of Removal, was filed at 4:00 p.m., and included as an attachment a copy of the third party petition which was filed by Dow at 3:55 p.m. Before filing the Notice of Removal, Dead Sea's counsel, Mr. Cole, verified with Dow's local counsel, that Dow had in fact filed the third party petition in state court. The Notice of Removal was filed at 4:00 p.m., which was after Mr. Cole confirmed that the third party action against Dead Sea was, in fact, filed in the State Court.

In other words, the defendant's third-party petition, and Dead Sea's ensuing removal, were filed five minutes

apart, in two different cities, after coordination between counsel. Petitioners, of course, were never served with either document until well after impleader and removal had been accomplished. In another case, the third-party petition and the removal were filed twenty minutes apart.

Again, the respondents never sought the required leave, under Tex. R. Civ. Proc. 38, to serve Dead Sea. Instead, without seeking leave of court, and without serving or otherwise notifying petitioners or the state courts, they served "courtesy copies" of the third-party claims on Dead Sea counsel, and contrived with their ostensible adversary, Dead Sea, for the removals to occur before petitioners even learned of them. In this way, of course, respondents avoided the normal state court scrutiny of requests to implead third parties. Respondents' unwillingness to use the normal state court procedures for impleading third parties reflects respondents' knowledge that they had no viable claim against Dead Sea.

Once in federal court, the cases were ultimately consolidated before Judge Lake of the Southern District of Texas. Prior to consolidation, however, certain rulings occurred. On June 10, 1994, prior to any ruling on any aspect of petitioners' motions for remand, a magistrate granted leave to respondents to serve amended third-party complaints on Dead Sea. App. 74. On June 30, 1994, Judge Lake consolidated the *Delgado* and another action, the *Jorge Carcamo* case, and tentatively denied petitioners' motions for remand on certain points. He ruled that Dead Sea qualified as a "foreign state" under the Foreign Sovereign Immunities Act, and as such its presence conferred subject matter jurisdiction over the actions in their entirety. Judge Lake reserved ruling on the other remand

issues. These included petitioners' contentions that Dead Sea's removals had been premature, that even if Dead Sea was a foreign sovereign it was immune from jurisdiction under the FSIA or had been fraudulently joined, and respondents' arguments that both diversity and federal question jurisdiction also existed.

The district court's decision that Dead Sea was a "foreign state" under the FSIA did not fully resolve the issue of subject matter jurisdiction. Under the Act, once an entity is classified as a foreign state, it is "presumptively immune from the jurisdiction of United States courts; unless a specified exception applies, a federal court lacks subject matter jurisdiction over a claim against a foreign state." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355 (1993). Unlike the normal foreign state defendant, however, Dead Sea was actively cooperating with the respondents that were ostensibly suing it, and so Dead Sea waived its immunity, thus strengthening respondents' arguments for federal subject matter jurisdiction. App. 81.

On March 23, 1995, a magistrate denied petitioners' motion for remand in the *Juan Valdez* action, a case that had not yet been transferred from the Eastern District of Texas, addressing only Dead Sea's status as a foreign state that had waived its immunity. On the same day, he granted defendants' motion for leave to sue Dead Sea in federal court. This case, too, ultimately was transferred to the Southern District of Texas.

On July 11, 1995, Judge Lake issued an order which disposed of the remaining remand issues, and granted respondents' motion to dismiss on forum non conveniens grounds. Judge Lake found that Dead Sea's removals were premature, and thus defective, because it had never

properly been made a party in the state court actions, and only parties can remove cases. He denied remand, however, because leave to add Dead Sea as a party had been granted *in federal court*. App. 106. Judge Lake rejected petitioners' contention that Dead Sea had been fraudulently joined, and also rejected respondents' contentions that other bases for federal subject matter jurisdiction existed. App. 85, 96-103.[1] Turning to the motion to dismiss on forum non conveniens grounds, Judge Lake granted this motion in its entirety. The claims were dismissed in favor of litigation in the petitioners' home countries, subject to certain conditions imposed on the defendants.[2]

Since a forum non conveniens dismissal requires the consent to foreign jurisdiction of all defendants, Judge Lake required Dead Sea to stipulate to foreign jurisdiction as well. On the date that Dead Sea was required to stipulate to foreign jurisdiction, respondents released

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[1] In those cases in which leave to add Dead Sea had *not* been granted in federal court, Judge Lake ordered remand. One such case, *Erazo*, was settled and is not part of this petition. Another such case, *Rodriguez*, was later removed for the third time. This case was disposed of by the Fifth Circuit's ruling and is included in this petition as to the first question presented. App. 5.

[2] Pursuant to Judge Lake's dismissal order, petitioners refiled their suits in the foreign countries. Since the claims were refiled in August of 1995, trial courts in Costa Rica, Panama, Nicaragua, Guatemala and the Philippines have refused to exercise jurisdiction over the refiled cases. Pursuant to Judge Lake's order, plaintiffs from Costa Rica and Panama have filed motions for reinstatement of their claims in the United States, since no further appeal of the jurisdictional rulings is available in these countries.

over 98% of their "claim" against Dead Sea. In two separate agreements, respondents agreed that Dead Sea's liability in any foreign proceeding would be capped at a figure not to exceed 2.5% of any foreign judgment. In the case of almost all countries the percentage is even smaller, and averages out to approximately 1.9%. Before the final dismissal of this action, then, respondents had released the vast majority of their claim against Dead Sea. App. 17. Even the remaining percentage liability was to be finally litigated not in the foreign proceedings, but in a separate proceeding in New York.

On October 27, 1995, the district court finally dismissed all of the cases. Petitioners appealed the dismissals to the United States Court of Appeals for the Fifth Circuit, which ultimately consolidated all of the cases into one appeal. App. 5. During the pendency of the appeal, certain petitioners settled their claims against some or all of the respondents. All petitioners and respondents technically remained parties in the Fifth Circuit, however, as that Court denied all motions to dismiss the appeal pursuant to settlement. App. 39.[3]

On October 19, 2000, the Fifth Circuit affirmed the district court's decision. First, the court of appeals held that indirect state ownership suffices for "foreign state" status under the FSIA. App. 23. Second, the court determined that Dead Sea's removals were not premature, and therefore not defective. App. 25, 26. The Fifth Circuit

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[3] The court of appeals stressed, however, that none of the settlements required either court approval or dismissal of the appeal as a condition of settlement, and that it was expressing no opinion as to any of the objections to the settlements filed by nonsettling respondents. App. 39.

denied a timely motion for rehearing on November 16, 2000. App. 176-77.

In this petition, two reasons are advanced for granting the writ. The first – the conflict among the lower courts on the construction of an important threshold provision in the Foreign Sovereign Immunities Act – applies to all petitioners. The second reason is that the Fifth Circuit has failed to follow controlling precedent from this Court on removal procedure. In view of the differences in procedural history among the various lower court cases consolidated in the district court and in the Fifth Circuit, this second contention applies only to petitioners in the *Jorge Carcamo* and *Juan Valdez* cases, Nos. H-94-1337 and H-95-1356. The petitioners in these two cases comprise the substantial majority of all petitioners.

REASONS FOR GRANTING THE WRIT

I. THERE IS A DIRECT CONFLICT AMONG THE COURTS OF APPEALS AND THE DISTRICT COURTS ON THE DEFINITION OF "FOREIGN STATE" UNDER THE FSIA

The Foreign Sovereign Immunities Act provides the exclusive source of jurisdiction over foreign states. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 443 (1989). The threshold question in any suit brought under the Act is whether the defendant, or third-party defendant as in this case, is a "foreign state."

A finding of foreign state status has highly significant consequences for both the entity in question and the litigant suing it. First, there is no right to a jury trial against any entity that qualifies as a foreign state. 28 U.S.C. §1441(d). Second, as noted above, if an entity is a foreign state, then it is immune from suit unless one of

the exceptions to immunity in §1605 applies. The most frequently invoked exception is the "commercial activity" exception, which requires that the plaintiff's claim must arise from "a commercial activity performed in the United States, or from 'an act performed in the United States in connection with a commercial activity of the foreign state elsewhere,' or from 'an act outside the territory of the United States in connection with the commercial activity of the foreign state elsewhere and that act causes a direct affect in the United States.' " 28 U.S.C. §1605(a)(2).

This standard generally requires that the commercial activity "bearing the nexus [to the United States] must be the same activity that gives rise to the claim." William C. Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tul. L. Rev. 535, 576 (1991). In some cases a court will lack jurisdiction over an entity if it is deemed a foreign state, but would be able to exercise jurisdiction under normal principles of general jurisdiction. *Hyatt Corp. v. Stanton*, 945 F.Supp. 675, 689 (S.D.N.Y. 1996) citing *Vencedora Oceanica Navigacion S.A. v. Compagnie Nationale Algerienne De Navigation*, 730 F.2d 195, 199 (5th Cir. 1984).

Another major consequence of foreign state status is, of course, a virtually unlimited removal right. Foreign states need not obtain the consent of codefendants to remove, they can remove the underlying claims as well as third-party claims asserted against them, and their time limits for removing cases can be extended merely for "cause," not necessarily good cause. 28 U.S.C. §1441(d); see e.g., *Refco, Inc. v. Galadari*, 755 F.Supp. 79, 83-84 (S.D.N.Y. 1991) (allowing removal by foreign state after

case had been pending in state court for over five years). These unusual removal rights are, of course, what led respondents to seek Dead Sea's cooperation here.

As detailed in part II below, this expansive removal ability also invites collusive third-party impleaders, to engineer the removal of otherwise unremovable cases. A number of other procedural consequences flow from foreign state classification as well. See Hoffman, supra, at 571-73 (noting different service of process rules that frequently blindside litigants who do not know that a company is state-owned, more restrictive rules for default judgments and prejudgment attachment, and shifting of the burden of proof on immunity issues).

In view of the important effects of "foreign state" status determinations, this Court should grant certiorari to resolve the conflicts among the lower courts set forth below.

A. The Courts of Appeals are Divided on Whether an Indirect Subsidiary of a Foreign State is Itself a Foreign State

The definitional section of the FSIA, 28 U.S.C. §1603, first defines a "foreign state" as "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) next defines "agency or instrumentality" as "any entity –

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States, nor created under the laws of any third country."

The dispute in this case is whether Dead Sea meets the second of the three criteria above. Dead Sea is only indirectly owned by Israel, through a "tiered" set of companies: Israel owns 75.3% of Israel Chemicals, Ltd., which owns 88.2% of Dead Sea Works, Ltd., which owns 100% of Dead Sea.[4] In other words, Israel, plainly a foreign state, owns Israel Chemicals, Ltd., plainly an agency or instrumentality.

The next company in the chain, however, is not a company "a majority of whose shares . . . is owned by a foreign state or political subdivision thereof." Instead, Dead Sea Works is owned only by an agency or instrumentality of a foreign state (Israel Chemicals). Dead Sea itself is a further step removed: it is owned by a company that is owned by an agency or instrumentality of a foreign state.

The Fifth Circuit held that such "indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state, assuming that all other requirements are met." App. 23. The court acknowledged the conflict with the Ninth Circuit's holding that only direct ownership is permitted by §1603(b), in *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1462 (9th Cir.), *cert. denied*, 516 U.S. 869 (1995). App.

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[4] In fact, Dead Sea is no longer majority-owned by Israel at all, and has been privately owned since February of 1995, before the trial court's judgment in this case. App. 81. It was indirectly owned by Israel at the time of its alleged involvement in the underlying events of this case, however, and at the time of suit. Petitioners have not contended that its change in status during the pendency of this case is relevant to the "foreign state" determination.

23. There is indeed a straightforward conflict between the Fifth and Ninth Circuits on this issue: in *Gates*, the Ninth Circuit squarely held that the entity in question was "wholly owned by an agency or instrumentality of a foreign state; [but] not owned by 'a foreign state or political subdivision thereof,' as required by the statute." *Id.* at 1462. The Ninth Circuit has adhered to its holding that direct ownership is required. *Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 655 (9th Cir. 1996).

Gates involved actions brought by employees who were terminated when their employer closed their plant. Defendants included several entities ultimately owned by a Canadian government body. Defendant Alberta Pork Producers Development Corp. ("Alberta Pork") is a Canadian entity which assists in the marketing of hogs produced in Alberta. Alberta Pork purchased Fletcher's Fine Foods ("FFF"). FFF, in turn, owns a number of subsidiaries and through those subsidiaries owned Golden Gate Fresh Foods ("GGFF"), a California pork processing plant. *Id.* at 1459.

Former employees of GGFF brought a class action against their direct employer, GGFF, as well as Alberta Pork, FFF and others. Alberta Pork and its wholly owned subsidiary FFF each moved for dismissal for lack of subject matter jurisdiction under the FSIA. The district court declined to decide whether defendants qualified as foreign sovereigns; instead it held that even if they were, there was subject matter jurisdiction, because they were not immune pursuant to the "commercial activities" exception to the Act. *Id.*

On appeal, the Ninth Circuit addressed the status of Alberta Pork and FFF under the Act. The court first set

out the statutory framework, in which the Act defines a foreign state to include any "agency or instrumentality of a foreign state," and then requires an "agency or instrumentality" to be, among other things, "an organ of a foreign state or political subdivision thereof, or [an entity, a] majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof". . . . 28 U.S.C. §1603(b)(2). The parties had agreed that other criteria for "agency or instrumentality" status were satisfied; the only issue before the court was whether the defendants were either "organs" of a foreign state, or majority-owned by a foreign state. The court concluded that Alberta Pork was an organ of the government, but that FFF was not. *Id.* at 1461. The only remaining issue, as in this case, was whether the entity claiming immunity could be indirectly owned by the foreign state.

After finding that FFF could not constitute an "organ" of Alberta, the Ninth Circuit turned to the remaining possibility for establishing agency or instrumentality status: the majority ownership option set out in subsection 1603(b). The facts were simple: Alberta Pork was an organ of the government of the province of Alberta, and as such, was an agency or instrumentality of a foreign state, and it owned 100% of the shares of FFF. The question presented was simply whether FFF could claim "agency or instrumentality" status, and therefore sovereign immunity, by being wholly owned by an entity *which was itself an agency or instrumentality of a foreign state.*

The Ninth Circuit closely read the plain language of the Act, and concluded that such a chain of ownership was *not* sufficient to confer foreign sovereign status on FFF, the wholly owned subsidiary of Alberta Pork. *Id.* at

1461-62. Tracking the statutory language, the Ninth Circuit held that FFF could only be an agency or instrumentality of a foreign state if a majority of its shares were owned by "a foreign state or political subdivision thereof." While it was true that FFF was wholly owned *by* an agency or instrumentality of a foreign state, it was not owned by the foreign state itself (or political subdivision thereof), as clearly required by the statute. The court explicitly rejected the argument that because Alberta Pork was itself an agency or instrumentality, that it *ipso facto* became a foreign state:

> First, the statute provides that a foreign state *includes* an agency or instrumentality, not that it *is* an agency or instrumentality or that it *is defined as* an agency or instrumentality. Second, the remainder of the statute contradicts any interpretation that would equate "an agency or instrumentality" with "a foreign state." If Congress had intended "agencies or instrumentalities of a foreign state" to mean "a foreign state" for the purposes of §1603, then it also would have intended a "political subdivision" to mean "a foreign state" because section 1603(a) defines a foreign state as including both "a political subdivision of a foreign state or an agency or instrumentality of a foreign state."

Id. at 1462 (emphasis the court's). The court found the statutory language strongly indicates that Congress did not intend this interpretation, however, because the remainder of the section differentiates between "foreign states" and "political subdivisions thereof." *Id.* Therefore, being owned by an agency or instrumentality is not synonymous with being owned by a foreign state or its political subdivision.

The Ninth Circuit found further support for its construction of section 1603 in the legislative history, citing the House Report on the Act:

> The second criterion requires that the entity be either an organ of a foreign state (or of a foreign state's political division), or that a majority of the entity's shares or other ownership interest be owned by a foreign state (or by a foreign state's political subdivision). If such entities are entirely owned by a foreign state, they would, of course, be included within the definition. Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality of a foreign state only if a majority of the ownership interests (shares of stock or otherwise) is owned by a foreign state. . . .

Id. at 1462, citing 1976 U.S.C.C.A.N. 6604, 6614.

The Ninth Circuit was convinced that the Act displays a clear recognition of the distinctions between foreign states, political subdivisions of foreign states, and agencies or instrumentalities of foreign states. Had Congress wished to confer "agency or instrumentality" status on entities owned by other agencies or instrumentalities, it could have done so clearly. It did not, however, and instead made clear that the requisite majority ownership could only be held by foreign states or their political subdivisions. Congress had sound policy reasons for drafting the Act as it did:

> Moreover, a contrary reading of the statute could expand immunity far beyond what Congress intended. As it is written, the Act provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. To add

> to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state or political subdivision or has a majority of its shares owned by the foreign state or political subdivision. Although such a broad view of sovereign immunity may very well be desirable, we cannot assume that Congress intended such a result when a literal reading of the statute leads to the opposite conclusion.

Id. In sum, both the plain language of the statute, and the Congressional purpose behind it, compelled a holding that FFF, as a lower-tier subsidiary, was not a foreign state.

The direct conflict between the Fifth and Ninth Circuits alone, on the treatment of subsidiary corporations under the FSIA, should suffice to warrant review by this Court to resolve the conflict. Other courts of appeals' opinions, however, also take different positions.

As noted by the court of appeals in this case, the Seventh Circuit also views indirect ownership as sufficient under §1603(b). *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 941 (7th Cir. 1996).[5] Conversely, one judge on the Third Circuit has indicated his belief that indirect ownership does not suffice. In *Federal Ins.*

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[5] The Court also cited two earlier cases, *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 427 (7th Cir. 1993), and *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449-50 (6th Cir. 1988). No party in either case, however, raised the tiering issue.

Co. v. Richard I. Rubin & Co., 12 F.3d 1270 (3d Cir. 1993), *cert. denied*, 511 U.S. 1107 (1994) all parties simply assumed that the indirectly-owned entities in question were foreign states. Judge Greenberg, however, raised the question sua sponte, and noted his belief that this assumption "might not be correct" because "a reasonable inference might be drawn that the term 'foreign state' in 28 U.S.C. §1603(b)(2) does not include an entity which is a foreign state only because it is an agency or instrumentality of a foreign state." *Id.* at 1285 n. 12. Judge Greenberg joined the opinion because the indirect-ownership issue had not been preserved, *id.*, but plainly felt that indirect ownership does not suffice.

Among the courts of appeals, then, two Circuits – the Fifth in the present case and the Seventh – view tiered ownership as sufficient for "foreign state" status. The Ninth Circuit holds the opposite, and a judge in the Third Circuit has supported the Ninth Circuit's view. Petitioners respectfully submit that this division among the courts of appeals warrants resolution of the question by this Court. As detailed immediately below, however, the district courts are also split on the issue.

B. The District Courts are Divided on Tiering

The district courts, too, have struggled with whether tiered ownership satisfies §1603(b)(2). Even judges within the same court have disagreed.

In *Gardiner Stone Hunter Int'l v. Iberia Lineas Aereas de Espana, S.A.*, 896 F.Supp. 125, 130 (S.D.N.Y. 1995), Judge Koeltl adopted the Ninth Circuit viewpoint, finding it "straightforward and persuasive." Just over a year later, Judge Mukasey of the Southern District also held that "[a] corporation a majority of whose shares are owned by

an agency or instrumentality is not a foreign state under the FSIA." *Hyatt Corp. v. Stanton*, 945 F.Supp. 675, 690 (S.D.N.Y. 1996). Judge Mukasey found both the Ninth and Seventh Circuits' reasoning unconvincing. Instead, he thoroughly examined the legislative history of §1603, and other factors including "the remoteness of corporations owned by agencies or instrumentalities from sovereign control, and the far-reaching consequences of including such corporations within the definition of foreign state coupled with the ambiguous language on which such consequences would have to rest," and held direct ownership essential. *Id.* at 688.

In *United States Fidelity & Guar. Co. v. Braspetro Oil Services Co.*, 1999 WL 307666 (S.D.N.Y., May 17, 1999) Judge Koeltl again held indirect ownership insufficient, agreeing with "Judge Muskasey's careful analysis." *Id.* at *5. Most recently, however, Judge Sweet has taken the opposing view. *Parex Bank v. Russian Sav. Bank*, 81 F.Supp.2d 506, 508 (S.D.N.Y. 2000).

Before the Fifth Circuit's ruling on the issue, courts within its boundaries had similarly disagreed, and indeed had reached different conclusions with regard to Dead Sea itself. After the district court ruling in this case, the United States District Court for the Eastern District of Louisiana held that Dead Sea was not a foreign state because "[t]he plain language of the clause defining 'agency or instrumentality' requires that a 'foreign state or political subdivision thereof' own the majority of the entity; it does not provide that an entity may be an 'agency or instrumentality' because it is majority owned by another agency or instrumentality." *Martinez v. Dow*

Chemical Co., 1996 WL 502461, *2 (E.D. La., Sept. 4, 1996).[6] In a later case, however, a different judge in the same district held, in a case not involving Dead Sea, that indirect ownership is all that is required by §1603(b)(2). *In re Clearsky Shipping Corp.*, 1999 WL 1021825, *4 (E.D. La., Nov. 8, 1999).

Other courts are similarly divided. Compare *Dewhurst v. Telenor Invest AS*, 83 F.Supp.2d 577, 593-95 (D.Md. 2000) (tiering not permitted), and *Southern Ocean Seafood Co. v. Holt Cargo Systems, Inc.*, 1997 WL 539763, *4-5 and n. 9 (E.D. Pa. 1997) (citing *Richard Rubin*, supra, and noting that "the dictum of the Third Circuit . . . [is] persuasive although it is set forth as the view of only one Judge."), with *Millicom Int'l Cellular, S.A. v. Republic of Costa Rica*, 995 F.Supp. 14, 18 n. 5 (D.D.C. 1998) (tiering permitted); and *Linton v. Airbus Industrie*, 934 S.W.2d 754, 762 (Tex. App. 1996), *cert. denied*, 525 U.S. 1145 (1999) (same). One district court has noted the conflict but avoided the question. *Proctor & Gamble Cellulose Co. v. Viskoza-Loznica*, 33 F.Supp. 2d 644, 654 n. 9 (W.D. Tenn. 1998).[7]

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[6] The plaintiffs in *Martinez* sued the same entities that are respondents here, making similar claims concerning sterility and cancer. These plaintiffs, however, are not among the petitioners here.

[7] Reflecting the deep split among courts, commentators are divided as well. Compare Jane H. Griggs, Note, *International Law – The Foreign Sovereign Immunities Act: Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. New Eng. L. Rev. 387, 429-34 (1998) (tiering should not be allowed), Kelly Shaul, Comment, *Tiered Entities and Sovereign Privileges Under the Foreign Sovereign Immunities Act*, 34 San Diego L. Rev. 1817, 1836-51 (1997) (same), Joseph W. Hardy, Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status under the*

In sum, there is a direct conflict among the courts of appeals and the district courts as to whether 28 U.S.C. §1603(b)(2) permits indirect ownership by a foreign government to suffice for "foreign state" status under the FSIA. This Court should resolve the conflict among these many decisions so that this provision is applied uniformly throughout the nation.

C. The Issue Of Foreign State Status Is Important

As noted above, the FSIA is the sole source of jurisdiction over foreign governments, their political subdivisions, organs, and subsidiary corporations. The question of whether indirectly-owned entities qualify for foreign state status is thus critical to determining the boundaries of that jurisdiction. It is important for this jurisdictional statute to receive this Court's authoritative construction.

The substantial majority of litigation under the FSIA concerns foreign government-owned corporations. While it is rarely problematic to determine whether a political entity constitutes a "foreign state or political subdivision thereof," most cases concern corporate entities. Today, U.S. citizens, be they persons or corporations, are much more likely to interact with such foreign government-owned corporations. "[E]conomic globalization brings domestic businesses increasingly into contact with foreign commerce." Hoffman, supra, at 566-67.

Foreign Sovereign Immunities Act, 31 Ga. L. Rev. 1121, 1128-51 (1997) (same), with Thad T. Dameris and Michael J. Muchetti, *Vectors to Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases*, 62 J. Air L. & Com. 959, 972-74 (1997) (tiering permitted).

The foreign commercial entity encountered by an American person or business is very likely to be state-owned. In a 1992 study, two-thirds of the foreign firms in the Fortune 500 were wholly or partly state-owned. Shaul, Note, supra at 1820, quoting Abdullahm Al-Obaidan and Gerald W. Scully, *Efficiency Differences between Private and State-Owned Enterprises in the International Petroleum Industry*, 24 Applied Economics 237 (1992). Yet the true degree of government involvement is often low. State-owned enterprises are frequently engaged in purely commercial activities. Hoffman, supra, 566 n. 152, citing R.P. Short, "The Role of Public Enterprises: An International Statistical Comparison," in *Public Enterprise in Mixed Economics* 110, 115 (International Monetary Fund 1984) (state-owned enterprises are engaged in virtually all industries, not simply natural monopoly areas traditionally associated with governmental control.).

In view of the burgeoning presence and reach of foreign state-owned businesses, it is crucial that the only jurisdictional statute addressing them be applied in a uniform manner in all courts. A patchwork of conflicting decisional authority on the proper definition of §1603(b)(2) leads to arbitrary and inequitable results, and to venue choices based on such considerations. For instance, if a foreign state-owned airplane flying from Chicago to Los Angeles crashed, potential plaintiffs would have to consider, as part of their litigation strategy, whether to file suit in Chicago, where tiering is allowed, or Los Angeles, where it isn't. Although plaintiffs "forum shop" for a variety of understandable and unobjectionable reasons, e.g. *Keeton v. Hustler Magazine, Inc.*, 465 U.S.

770, 779 (1984), differing applications of federal jurisdictional provisions ought not be part of the equation. And if the plane crashed in New York, federal jurisdiction could depend on which federal judge was drawn.[8]

In view of the pronounced and widespread disagreement on the issue of indirect ownership, this Court should grant certiorari to resolve the confusion. This important federal jurisdictional provision should be applied uniformly in all courts in the United States.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S RECENT DECISION IN *MURPHY BROS., INC. V. MICHETTI PIPE STRINGING, INC.*

In *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344 (1999) this Court held that "a named defendant's time to remove is triggered" only upon service of a complaint. *Id.* at 347-48. Resolving a conflict among the lower courts as to whether formal service of process was required to begin a defendant's removal period under 28 U.S.C. §1446(b), the Court first noted that service of process is essential to any obligation of a named defendant to act in a suit brought against it:

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[8] Dead Sea itself has been the subject of several differing holdings about its status. In addition to the divergent opinions in the district courts within the Fifth Circuit, Dead Sea has been "sued" as a cooperative third-party defendant in a similar pesticide case in Hawaii. It dutifully removed the entire case the same day. Applying *Gates*, the United States District Court for the District of Hawaii held that Dead Sea was not a foreign state. *Patrickson v. Dole Food Co.*, No. 97-01516 HG (D.Haw., Sept. 9, 1998). The pertinent portion of this opinion appears in the Appendix at 178-204. See App. 195.

> Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant . . . . In absence of service of process (or waiver of service by the defendant), a court ordinarily may not exercise power over a party the complaint names as defendant . . . . Accordingly, one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend.

Id. at 350 (citations and quotations omitted). Accordingly, the Court reaffirmed "the historic function of service of process as the official trigger for responsive action by an individual or entity named defendant." *Id.* at 352 (footnote omitted).

The district court here had held as much four years earlier. Respondents made the very same argument rejected in *Murphy Bros.*: "Defendants' argument rests on the rule that the time for removal ordinarily begins upon receipt, 'through service or otherwise,' of the pleading first evidencing removability . . . . [D]efendants argue that Dead Sea was entitled to remove when it received a copy of the third-party petition against it without waiting for the state court to act." App. 93-94. But Judge Lake rejected this argument, holding straightforwardly that because state court leave to implead Dead Sea had never been granted, "Dead Sea's removal was defective because Dead Sea was not yet a 'defendant' in the cases when it removed them." App. 87. Nonetheless, the district court denied remand because in *federal court*, magistrates had granted *post-removal* leave to add Dead Sea as a party.

On appeal, the Fifth Circuit agreed that the post-removal amendments were ineffective. The court still

affirmed the denial of remand, nevertheless, because in its view the removals were not premature in the first place:

> Plaintiffs' logic proceeds as follows: (1) at the time of removal, the state court had not granted leave to serve Dead Sea, so Dead Sea was not a party in state court; (2) as a non-party, Dead Sea could not remove to federal court; (3) without Dead Sea's presence in federal court, there was no federal subject matter jurisdiction; and (4) in the absence of subject matter jurisdiction, (a) the magistrate judges had no authority to issue post-removal orders, and (b) the district court had no choice but to remand.
>
> In the face of the district court's ruling that there had to have been court leave to serve the third-party petitions on Dead Sea and that the removals were, therefore, premature, we recognize the logical force of plaintiffs' argument. Nevertheless, we reject plaintiffs' desired result because, contrary to the district court and plaintiffs' view, the removals were not premature. Generally, service of process is not an absolute prerequisite to removal.

App. 24-25. The Fifth Circuit wholly failed to follow *Murphy Bros.* The court held that the failure of respondents to obtain leave from the state courts to serve Dead Sea was immaterial, because service is not a prerequisite to the ability to remove. The court of appeals acknowledged this Court's holding that receipt of a complaint, without formal service, does not trigger a defendant's obligation to remove. The court of appeals nonetheless attempted to distinguish *Murphy Bros.* by declaring that a defendant is *permitted* to remove without having been served. The fundamental point of *Murphy Bros.*, however, is that an entity is not a party until it has been served:

"one becomes a party officially, and is required to take action in that capacity, only upon service of a summons or other authority-asserting measure stating the time within which the party served must appear and defend." *Id.* at 350.

Moreover, even if Dead Sea was *procedurally* able to remove, how could it supply a basis for federal jurisdiction *if it was not in the case*? Again, under both the district court's opinion and the Fifth Circuit's opinion, Dead Sea was not a party in state court. Leaving aside whether it could remove the case as a nonparty, it plainly could not supply federal subject matter jurisdiction, under the FSIA, if it was not in the case. While its nonparty status may not deprive it of removal power, Dead Sea surely could not provide federal jurisdiction in a case in which it was not a party.

One must step back for a moment, to see exactly the scheme respondents must defend:

> 1. In deliberate and orchestrated violation of the state rules, and without notice to the state court or plaintiffs, respondents and a willing third-party defendant arrange for filing of the third-party complaint and a simultaneous removal:
>
> > The Notice of Removal was filed at 4:00 p.m. and included as an attachment a copy of the third-party petition which was filed by Dow at 3:55 p.m. Before filing the Notice of Removal, Dead Sea's counsel, Mr. Cole verified with Dow's local counsel, that Dow had in fact filed the third-party petition in state court. The Notice of Removal was filed at 4:00 p.m., which was after Mr. Cole confirmed that the third-party action against Dead Sea was, in fact, filed in state court.

2. Having thus colluded to circumvent the state rules to remove an unremovable case, ask magistrates for leave to amend in Dead Sea – in effect recognizing that Dead Sea had *not* been made a party in state court to begin with.

3. Then, after obtaining dismissal on a defense not available in state court, release over 98% of the claim against the ostensibly adverse third party.

Murphy Bros. does not permit this Kafkaesque result. Nor should this Court indulge the halfhearted attempt, in a footnote, to distinguish *Murphy Bros.* on the ground that service of process is not required before a party can remove a case. Such reasoning not only runs afoul of *Murphy Bros.'* clear statement that "one becomes a party officially" only upon service. It also opens up vast opportunities for collusive removals of the kind that occurred in this case.

One important purpose behind state third-party practice rules, of course, is the regulation of impleader by the court after a certain point in the litigation. Texas' Rule 38(a) gives defendants 30 days – three times the period afforded in Fed. R. Civ. Proc. 14(a) – to implead third parties as of right. After that point, the state judge determines whether leave to implead should be granted. Among the considerations, of course, is whether the third-party claim is viable, and whether it is interposed for delay. E.g., *Valley Industries, Inc. v. Martin*, 733 S.W.2d 720, 721 (Tex. App. 1987). Noting the potential for removals to be set up in the way they were below, two members of a firm representing one of the respondents have recommended such ploys in an article designed to help defendants in transnational cases use "some unconventional approaches to ensure a federal forum . . . ."

Thad T. Dameris and Michael J. Muchetti, *Vectors to Federal Court: Unique Approaches to Subject Matter Jurisdiction in Aviation Cases*, 62 J. Air L. & Com. 959, 960 (1998).[9] Counsel give the following advice for arranging collusive removals:

> Even if a defendant cannot qualify as a foreign sovereign under the FSIA, a third-party defendant might. A defendant may sue a third party who is a "foreign sovereign" under the FSIA and this third-party, foreign sovereign defendant may remove the action to federal court. A court should not concern itself "with why these parties prefer to be in federal court so long as there is a legitimate basis for jurisdiction." In most jurisdictions, such a third-party defendant can remove the entire action to federal court.

Id. at 975-76, quoting *Roselawn*, supra, 96 F.3d at 942. When there is no bona fide claim against the friendly third-party defendant, however, then if the litigation has progressed, the state judge may not grant leave to serve the third-party complaint. What to do? Simply go behind the state court's back.

The Fifth Circuit countenanced such gamesmanship with its holding below. In so doing, however, it deviated from the clear and recent holding in *Murphy Bros.* that removability does not begin until service. This Court should grant the writ and reverse the Fifth Circuit's mischievous holding.

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[9] The authors are members of the firm that is lead counsel for respondent Occidental Chemical Corp.

CONCLUSION

In view of the conflict among the lower courts on indirect ownership under the FSIA, and the departure from this Court's authority on removal procedure, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 95-21074

FRANKLIN RODRIGUEZ DELGADO, ET AL. (Individually and on behalf of all others similarly situated),

Plaintiffs-Appellants-Cross-Appellees,

VERSUS

SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (Individually and as successor to Occidental Chemical Company and Occidental Chemical and Agricultural Products, Inc.); STANDARD FRUIT CO.; STANDARD FRUIT AND STEAMSHIP COMPANY; DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT CO.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC.; DEL MONTE TROPICAL FRUIT COMPANY,

Defendants-Appellees-Cross-Appellants,

DEL MONTE FRESH PRODUCE, N.A.,

Defendant-Third Party Plaintiff-Appellee-Cross-Appellant,

VERSUS

DEAD SEA BROMINE COMPANY, LTD.; AMERIBROM, INC.,

Third Party Defendants-Appellees-Cross-Appellants.

****

JORGE COLINDRES CARCAMO, ET AL. (Individually, and on behalf of all others similarly situated),

Plaintiffs-Appellants-Cross-Appellees,

VERSUS

SHELL OIL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (Individually and as successor to Occidental Chemical and Occidental Chemical and Agricultural Products, Inc.); STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC.,

Defendants-Appellees, Cross-Appellants,

DOW CHEMICAL COMPANY,

Defendant-Third Party Plaintiff-Appellee-Cross Appellant,

VERSUS

DEL MONTE FRESH PRODUCE COMPANY (sued as Del Monte Tropical Fruit Company); DEAD SEA BROMINE COMPANY, LTD.; AND AMERIBROM, INC.,

Third Party Defendants-Appellees-Cross-Appellants,

DEL MONTE FRESH PRODUCE, N.A., INC.,

Third Party Defendant-Fourth Party Plaintiff-Appellee-Cross-Appellant,

VERSUS

BROMINE COMPOUNDS, LTD.,

Fourth Party Defendant-Appellee-Cross-Appellant.

****

JUAN RAMON VALDEZ, ET AL.,
Plaintiffs-Appellants-Cross-Appellees,

VERSUS

SHELL OIL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (Individually and as successor to Occidental Chemical Company and Occidental Chemical and Agricultural Products, Inc.); STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC.,

Defendants-Appellees-Cross-Appellants,

DOW CHEMICAL COMPANY,

Defendant-Third Party
Plaintiff-Appellee-Cross-Appellant,

VERSUS

DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE TROPICAL FRUIT COMPANY; DEAD SEA BROMINE COMPANY, LTD.; AMERIBROM, INC.,

Third Party Defendants-Appellees-Cross-Appellants.

****

ISAE CARCAMO,

Plaintiff-Appellant-Cross-Appellee,

VERSUS

DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (Individually and as successor to Occidental Chemical Company and Occidental Chemical and Agricultural Products, Inc.); STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY,

Defendants-Appellees-Cross-Appellants,

SHELL OIL COMPANY

Defendant-Third Party
Plaintiff-Appellee-Cross-appellant,

VERSUS

DEAD SEA BROMINE COMPANY, LTD.;
AMERIBROM, INC.,

Third Party Defendants-Appellees-Cross-Appellants.

No. 97-20060

RAMON RODRIGUEZ RODRIGUEZ,

Plaintiff-Appellant,

VERSUS

SHELL OIL COMPANY; STANDARD FRUIT &
STEAMSHIP COMPANY; CHIQUITA BRANDS;
CHIQUITA BRANDS INTERNATIONAL, INC.;
STANDARD FRUIT COMPANY,

Defendants-Third Party Plaintiffs-Appellees,

and

DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT
CO.; DOW CHEMICAL COMPANY; OCCIDENTAL
CHEMICAL,

Defendants-Appellees,

VERSUS

BROMINE COMPOUNDS, LTD.; AMVAC CHEMICAL
COMPANY; DEAD SEA BROMINE COMPANY, LTD.,

Third Party Defendants-Appellees.

Appeals from the United States District Court
For the Southern District of Texas

(Filed Oct. 19, 2000)

Before GARWOOD, WIENER and DeMOSS, Circuit Judges.

DeMOSS, Circuit Judge:

In these consolidated appeals,[1] Plaintiffs-Appellants ("Plaintiffs"), who are several thousand foreign agricultural workers, challenge the district court's orders dismissing on forum non conveniens, five of six cases removed from Texas state court. Plaintiffs assert that the removals were improper and that the district court lacked subject matter jurisdiction. Concluding that removal and jurisdiction were proper in all of the five dismissed cases, we affirm.

I. BACKGROUND

A. Overview

Plaintiffs originally filed all six cases in various Texas state courts, seeking damages for injuries allegedly caused by their apparently incremental exposure over a considerable period to a nematocide, dibromochloropropane ("DBCP"), while working on

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[1] By a concurrent order, appeal No. 97-20060 is consolidated with appeal No. 95-21074.

banana farms in several foreign countries. Plaintiffs justify their presence in the state courts of Texas on provisions of a Texas statute that furnishes a Texas forum to a plaintiff who has been injured in a foreign country if that plaintiff is a citizen of a foreign country that has equal treaty rights with the United States. *See* Tex. Civ. Prac. & Rem. Code § 71.031. Defendants-Appellees (collectively "Defendants") are Shell Oil Company ("Shell"), Dow Chemical Company ("Dow"), Occidental Chemical Corporation ("Occidental"), Standard Fruit Company and Standard Fruit & Steamship Company (collectively "the Standard Fruit entities"), Dole Fresh Fruit Company and Dole Food Company, Inc. (collectively "the Dole entities"), Chiquita Brands, Inc., and Chiquita Brands International, Inc. (collectively "the Chiquita entities"), and Del Monte Tropical Fruit Company and Del Monte Fresh Produce, N.A. (collectively "the Del Monte entities"). Defendants are alleged to have designed, manufactured, sold, or used DBCP.

The filing of these cases in the state courts of Texas was by no means happenstance. In a classic exercise of forum shopping, Plaintiffs selected Texas because, among other plaintiff-friendly features, its law at the time of filing provided no applicable doctrine of forum non conveniens pursuant to which their actions could be dismissed. *See* ***Dow Chemical Co. v. Castro Alfaro***, 786 S.W.2d 674, 679 (Tex. 1990).[2]

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[2] The Texas legislature subsequently enacted a statute making the doctrine of forum non conveniens applicable to personal injury actions filed on or after September 1, 1993. *See*

In response, Defendants determined that removal of these cases to federal court, where forum non conveniens was available, would be an effective way to send these suits back to their countries of origin. In pursuit of their objective, a different pre-designated defendant in each of the six cases first filed a third-party petition impleading Dead Sea Bromine Company, Limited ("Dead Sea"). Next, Dead Sea removed each action to federal court by virtue of its alleged status as a "foreign state" under the Foreign Sovereign Immunity Act ("FSIA"), 28 U.S.C. §§ 1602-1611.[3] As the third step, Dead Sea waived its sovereign immunity in each of the federal cases.

But, among other things, Plaintiffs contend that Texas Rule of Civil Procedure 38(a) requires a third-party plaintiff to obtain leave of court to serve a third-party petition when it is filed more than thirty days after service of the defendant's original state court answer.[4] In four of the six cases, the third-party petitions were filed more than thirty days after the answers. In the remaining two cases, the third-party petitions were filed within less than thirty

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Tex. Civ. Prac. & Rem. Code § 71.051. Plaintiffs filed the instant actions before that date.

[3] Under 28 U.S.C. § 1441(d), a foreign state is entitled to remove to federal court any civil action brought against it in a state court.

[4] Tex. R. Civ. P. 38(a) provides, "The third-party plaintiff need not obtain leave to make the service [on the third-party defendant] if he files the third-party petition not later than thirty (30) days after he serves his original answer. Otherwise, he must obtain leave on motion upon notice to all parties to the action."

days following the answers, so leave of court was not required.

B. Prior Proceedings

Against this backdrop, we pause to recount in turn the individual procedural history of each case, for cognizance of the prior proceedings in each is essential to our determination of (1) the efficacy of Defendants' joinder of Dead Sea, (2) the validity of Dead Sea's removals, and (3) the existence of federal subject matter jurisdiction.

1. ***Delgado v. Shell Oil Co. ("Delgado")***

The ***Delgado*** plaintiffs are more than 2,000 residents of three foreign countries who filed suit originally in Galveston County, Texas.[5] The defendants in ***Delgado*** previously attempted to remove to federal court, asserting that the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, preempted the plaintiffs' claims and provided federal question jurisdiction. The district court remanded, noting that even if the FIFRA preempted the ***Delgado*** plaintiffs' claims, there was no federal question jurisdiction. *See* ***Rodriguez v. Shell Oil Co.***, 818 F. Supp. 1013, 1018 (S.D. Tex. 1993).[6]

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[5] The ***Delgado*** plaintiffs are residents of Costa Rica, Nicaragua, or Panama. The ***Delgado*** defendants are Shell, Dow, Occidental, the Standard Fruit entities, the Dole entities, the Chiquita entities, and the Del Monte entities.

[6] Following remand, the state court consolidated ***Delgado*** with ***Aguilar v. Shell Oil Co.***, an action brought in that court by an uncertified class of all persons (and their spouses) in Costa

Subsequently, Defendant Del Monte Fresh Produce, N.A., filed an original answer in state court and, within thirty days, served a third-party petition impleading Dead Sea and its American affiliate, Ameribrom, Inc., ("Ameribrom") as third-party defendants. State court leave to serve the third-party petition was not required. Later the same day that the third-party petition was filed against it, Dead Sea removed the case to the Southern District of Texas, Galveston Division.[7]

The other defendants joined in the removal and filed cross-claims against Dead Sea and, in some cases, against one another.[8] Shell filed supplemental notices of removal. The ***Delgado*** plaintiffs filed a motion to remand, asserting lack of subject matter jurisdiction. The district court denied the motion, concluding that Dead Sea was a foreign state entitled to remove, pursuant to 28 U.S.C. § 1441(d),[9] and consolidated ***Delgado*** with ***Jorge***, which we consider next.

Rica who had been adversely exposed to DBCP that was allegedly designed, manufactured, marketed, distributed, or sold by one or more of the defendants and who had not already commenced an individual civil action. The defendants in ***Aguilar*** are Shell, Dow, Occidental, and the Standard Fruit entities.

[7] The district judge to whom the case was originally assigned recused himself. The case was transferred to the Houston Division and assigned to the district judge whose decisions form the basis of these appeals.

[8] Del Monte Fresh Produce, N.A., did not file a cross-claim against Dead Sea.

[9] The district court refrained from deciding at that time whether Dead Sea's presence conferred federal subject matter jurisdiction.

2. *Jorge Carcamo v. Shell Oil Co. ("Jorge")*

The ***Jorge*** plaintiffs are nine representatives who filed suit originally in Brazoria County, Texas, on behalf of themselves and an uncertified class of more than 16,000 citizens and residents of twelve foreign countries.[10] Defendant Dow filed a third-party petition against Dead Sea, Ameribrom, and the Del Monte entities and delivered a courtesy copy of that petition to Dead Sea. More than thirty days had elapsed since Dow had served its original answer in state court, and Dow did not obtain state court leave prior to filing the third-party petition. Regardless, on the same day that Dow filed its third-party petition, Dead Sea removed the case to the Southern District of Texas, Galveston Division.[11] Predictably, the other defendants joined in the removal, asserting additional bases of subject matter jurisdiction, and filed cross-claims. Shell filed supplemental notices of removal. The ***Jorge*** plaintiffs filed motions to remand, arguing that (1) Dead Sea's removal was procedurally defective for

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[10] The ***Jorge*** plaintiffs are residents of Burkina Faso, Costa Rica, Dominica, Ecuador, Guatemala, Honduras, Ivory Coast, Nicaragua, Panama, the Philippines, Saint Lucia, or Saint Vincent. One of the Honduran plaintiffs is allegedly a resident of California. The ***Jorge*** defendants are the same as those in ***Delgado*** with the exception of the Del Monte entities, which are not defendants in ***Jorge***.

[11] The district judge to whom the case was originally assigned (and to whom ***Delgado*** had also been originally assigned) recused himself. The case was transferred to the Houston Division and ultimately assigned to the district judge whose decisions form the basis of these appeals.

want of state court leave to serve Dead Sea, and that (2) the district court lacked subject matter jurisdiction as the *Jorge* plaintiffs' Seventh Amended Petition expressly renounced any intention of pursuing claims against Dead Sea or its affiliated entities, thus rendering Dead Sea's joinder "fraudulent." Subsequent to removal, however, Dow moved for leave to serve an amended third-party complaint impleading, inter alia, Dead Sea.[12] The motion was referred to a magistrate judge, who granted the motion.

3. *Rodriguez v. Shell Oil Co. ("Rodriguez")*

The ***Rodriguez plaintiffs*** are Honduran citizens and residents who filed suit originally in Jim Hogg County, Texas.[13] Defendants Shell and the Chiquita entities filed third-party petitions against Dead Sea and Ameribrom more than thirty days after filing their original answers in state court, without any prior approval by the state court.

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[12] The other third-party defendants served were Ameribrom, the Del Monte entities, AMVAC Chemical Corp. ("AMVAC"), Saint Lucia Banana Growers Association, Saint Vincent Banana Growers Association, Dominica Banana Growers Association, and Programa Nacional de Banano. Del Monte Fresh Produce, N.A., then filed a fourth-party complaint impleading Bromine Compounds, Ltd., ("Bromine") a wholly owned subsidiary of Dead Sea. The district court later dismissed Dominica Banana Growers Association, Saint Lucia Banana Growers Association, Saint Vincent Banana Growers Association, and Programa Nacional de Banano.

[13] One *Rodriguez* plaintiff is alleged to be a resident of Texas and another a resident of Michigan. The *Rodriguez* defendants are the same as those in *Jorge*.

After these petitions were filed, Dead Sea removed the case to the Southern District of Texas, Laredo Division. The other defendants joined in the removal, asserting additional bases of federal subject matter jurisdiction, and filed cross-claims against Dead Sea. Shell filed supplemental notices of removal. The ***Rodriguez*** plaintiffs moved to remand, asserting lack of subject matter jurisdiction. The district court in Laredo transferred ***Rodriguez*** to the Houston Division where it was consolidated with ***Delgado***, ***Jorge***, and the following case.

4. *Erazo v. Shell Oil Co. ("Erazo")*

In ***Erazo***, a lone Honduran citizen filed suit originally in Hidalgo County, Texas.[14] Defendant Shell filed a third-party petition against Dow, Occidental, Dead Sea, Ameribrom, and AMVAC more than thirty days after answering and without leave to serve the petition. Dead Sea immediately removed the case to the Southern District of Texas, McAllen Division. The remaining defendants joined in the removal, asserting additional bases of federal subject matter jurisdiction, and filed cross-claims against Dead Sea. Shell filed supplemental notices of removal. The ***Erazo*** plaintiff moved to remand, asserting lack of subject matter jurisdiction. The district court transferred the case to the Houston Division where it was consolidated with the others.

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[14] Shell attempted to remove, asserting federal question jurisdiction based on FIFRA preemption, but the district court remanded for lack of subject matter jurisdiction, as it did in ***Delgado*** and ***Rodriguez***.

5. *Isae Carcamo v. Shell Oil Co. ("Isae")*

Isae was originally brought in Morris County, Texas, by another lone Honduran citizen and resident.[15] Defendant Dow filed a single pleading containing both an answer and a third-party petition against Dead Sea, Ameribrom, and the Del Monte entities. As a result, state court leave to serve that petition was not required. Dead Sea removed the case to the Eastern District of Texas, and the other defendants joined in the removal, asserting additional bases of federal subject matter jurisdiction, and filed cross-claims against Dead Sea. Shell filed supplemental notices of removal. The ***Isae*** plaintiff moved to remand, asserting lack of subject matter jurisdiction. The case, however, was consolidated with ***Valdez***, which we consider last.

6. *Valdez v. Shell Oil Co. ("Valdez")*

The plaintiffs in ***Valdez*** are more than 6,000 citizens of eight foreign countries who filed suit originally in Morris County, Texas.[16] More than thirty days after

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[15] Originally, Shell was the only ***Isae*** defendant. Shell filed a notice of removal, asserting federal question jurisdiction based on FIFRA preemption, but the district court remanded the case for the reasons articulated in ***Delgado***, ***Rodriguez***, and ***Erazo***. The plaintiff then amended his petition to add, as defendants, Dow, Occidental, the Dole entities, and the Standard Fruit entities.

[16] The ***Valdez*** plaintiffs are citizens of Burkina Faso, Dominica, Ecuador, Honduras, Ivory Coast, the Philippines, Saint Lucia, or Saint Vincent. At least two of them allegedly

answering, Defendant Dow filed a third-party petition against the Del Monte entities, Dead Sea, and Ameribrom and delivered a courtesy copy of that petition to Dead Sea. Dead Sea removed the case to the Eastern District of Texas. The other defendants joined in the removal, asserting additional bases of federal subject matter jurisdiction, and filed cross-claims against Dead Sea. Shell filed supplemental notices of removal. The district court consolidated ***Valdez*** with ***Isae***.

Subsequent to removal, Dow moved for leave to serve an amended third-party complaint to implead, inter alia, Dead Sea.[17] The magistrate judge assigned to the ***Valdez*** case granted the motion and also denied remand in both ***Valdez*** and ***Isae***, concluding that federal subject matter jurisdiction existed in the two cases. Thereafter, ***Valdez*** and ***Isae*** were transferred to the Southern District of Texas, Houston Division, where they were consolidated with the other four cases.

C. The Houston District Court's Proceedings

Once the six cases were consolidated in the Houston Division of the Southern District, Plaintiffs filed (1) motions to remand, asserting lack of subject matter jurisdiction and procedurally defective removal, and (2)

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reside in Texas. The ***Valdez*** defendants are the same as those in ***Jorge***.

[17] The other third-party defendants served were Ameribrom, the Del Monte entities, AMVAC, Saint Lucia Banana Growers Association, St. Vincent Banana Growers Association, and Programa Nacional de Banano.

motions to strike the third-party claims or, in the alternative, to dismiss Dead Sea and its affiliated entities for fraudulent joinder, and to remand the underlying claims. Defendants contested the fraudulent joinder allegation, asserting the validity of their third-party claims against Dead Sea based on the laws of the home countries of several of the plaintiffs. As a final step, Defendants filed motions to dismiss all of the removed cases for forum non conveniens.

The district court addressed first whether Dead Sea's removals were proper in ***Jorge***, ***Valdez***, ***Rodriguez***, and ***Erazo***, the cases in which Texas law required leave of state court to serve the third-party petitions. The court concluded that all removals were premature and, thus, defective for want of leave. Deferring to the authority of the state court to determine in the first instance whether third-party joinder was appropriate, the district court remanded ***Rodriguez*** and ***Erazo***. On appeal, neither party challenges this decision to remand.

In ***Jorge*** and ***Valdez***, however, the district court noted that magistrate judges had issued post-removal orders granting leave to implead Dead Sea into federal court pursuant to Federal Rule of Civil Procedure 14. The district court assumed that Dead Sea had, thus, validly been made a party in federal court and would remain a party on remand to state court. Speculating that Dead Sea would "immediately exercise its presently mature right to again remove the actions to federal court," the district court concluded that remand would be futile and denied remand.

The district court also denied remand in the final two cases, ***Delgado*** and ***Isae*** (the "under thirty days" cases), in neither of which had leave to make service on Dead Sea been required under Texas law.[18] Invoking the doctrine of forum non conveniens, the district court then dismissed all four cases that remained unremanded – the two "over thirty days" cases and the two "under thirty days" cases.

As conditions precedent to dismissal, the district court required Defendants (including third- and fourth-party defendants) to (1) waive all jurisdictional and certain limitation-based defenses, (2) permit the dismissed plaintiffs a reasonable period within which to conduct discovery before trial in their home countries, and (3) agree to satisfy those plaintiffs' concerns with respect to the enforceability of foreign judgments that might be rendered against Defendants. In addition, the district court permanently enjoined the dismissed plaintiffs from commencing or causing to be commenced in the United States any DBCP action and from intervening in ***Rodriguez*** and ***Erazo***, the two remanded cases. Finally, the district court agreed that it would re-assume jurisdiction, on proper motion, if the highest court in any foreign country should affirm a dismissal for lack of jurisdiction over any action commenced by a dismissed plaintiff in his home country or his country of injury.

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[18] In ***Delgado***, Del Monte Fresh Produce, N.A., filed a third-party petition against Dead Sea within thirty days of the service of its (Del Monte's) answer in state court. In ***Isae***, Dow filed a single pleading containing an answer and a third-party petition against Dead Sea.

D. The Agreements Between Defendants And Dead Sea

On the day that Dead Sea was required to stipulate to foreign judgment, Defendants and Dead Sea entered into a pair of agreements which together allocated their joint liability in the event of an adverse judgment.[19] Those agreements stipulated Dead Sea's maximum percentage market share liability in each foreign country. In no country was that share greater than 2.5%.

As soon as Plaintiffs got word of the existence of the agreements, they filed a motion for relief from final judgment, pursuant to Federal Rule of Civil Procedure 60(b)(2), arguing that Defendants (1) never intended to prosecute their claims against Dead Sea and (2) joined Dead Sea only to gain entry into federal court. Plaintiffs asked the district court to remand the entire matter to state court or, in the alternative, to sever the third-party claims and remand the underlying ones. The district court denied Plaintiffs' motion.

E. The Re-Removal Of *Rodriguez*

When the district court remanded *Rodriguez* to Texas state court on July 11, 1995, the Standard Fruit entities

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[19] The first agreement was executed by the "Manufacturer Defendants," defined as Dow, Shell, and Occidental, and "Dead Sea," defined as Dead Sea and Bromine. The second agreement was executed by the "Non- Manufacturer Defendants," defined as the Standard Fruit entities, the Dole entities, the Del Monte entities, and the Chiquita entities, and "Dead Sea," again defined as Dead Sea and Bromine.

had on file a "Special Appearance Objecting to Jurisdiction, First Amended Motion to Transfer Venue, or in the Alternative Motion to Dismiss, and First Amended Original Answer." In essence, the Standard Fruit entities had filed their answers subject to and without waiving their special appearances. Upon remand, the state court addressed and denied the Standard Fruit entities' special appearances on February 2, 1996, with the order filed on February 5, 1996. On March 4, 1996, without obtaining leave from the state court, the Standard Fruit entities filed third-party petitions naming Dead Sea, Bromine, and AMVAC as third-party defendants and delivered courtesy copies to Dead Sea and to Bromine. Thereafter, Dead Sea and Bromine removed the case to the Laredo Division of the Southern District of Texas, asserting federal question jurisdiction as a foreign state under the FSIA. The case was then transferred to the federal district court at Houston, whose decisions form the basis of these appeals.

In the district court, the ***Rodriguez*** plaintiffs moved for remand, arguing that the Standard Fruit entities should have asked for leave from the state court before filing their third-party petitions pursuant to Rule 38(a) because the Standard entities had filed their original answers in August of 1993 and their amended original answers on September 17, 1993, over two years from the time that the Standard Fruit entities had filed their third-party petitions. The district court denied the motion, finding that the Standard Fruit entities' answers were conditional and did not become effective for purposes of Rule 38(a) until the state court overruled the Standard Fruit entities' special appearances. As in ***Delgado***, the

Rodriguez plaintiffs sought to strike the third-party claims on grounds of fraudulent joinder or, in the alternative, to sever the third-party claims while the Defendants moved for dismissal on forum non conveniens. The district court denied the ***Rodriguez*** plaintiffs' motions, but granted dismissal subject to the same conditions as in ***Delgado***.

F. The Appeals[20]

In appeal No. **95-21074,** Plaintiffs timely seek review of the district court's dismissal of the "over thirty days" cases (***Jorge*** and ***Valdez***) and the "under thirty days" cases (***Delgado*** and ***Isae***), asserting that the district court erred in denying remand and in dismissing these cases for forum non conveniens. Specifically, Plaintiffs maintain that: (1) Dead Sea is not a "foreign state" under the FSIA; (2) the magistrate judges' orders in the "over thirty days" cases were nullities which could neither cure Defendants' defective joinder of Dead Sea and Dead Sea's premature removal nor confer on the district court its otherwise lacking subject matter jurisdiction; (3) Dead Sea was fraudulently joined; and (4) the district court abused its discretion in denying Plaintiffs' Rule 60(b)(2) motion. In appeal No. 97-20060, besides charging that Dead Sea is not a "foreign state" under the FSIA and that it was fraudulently joined, Plaintiffs contend that the district court erred when it ruled that the Standard Fruit entities' answers did not become effective for purposes of Rule

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[20] ***Erazo*** is not on appeal.

38(a) until the state court overruled their special appearances. In neither of the appeals, however, do Plaintiffs explicitly take umbrage with the substance of the district court's forum non conveniens analysis, or its use by the court were we to conclude that it had subject matter jurisdiction.[21]

II. DISCUSSION

A. Subject Matter Jurisdiction And The Foreign Sovereign Immunity Act

Before proceeding to the other issues raised in these appeals, we must first address whether the district court would have subject matter jurisdiction over any case that Dead Sea properly removed, for original jurisdiction is absolutely essential to the maintenance of an action in federal court. *See* ***Avitts v. Amoco Prod. Co.***, 53 F.3d 690, 693 (5th Cir. 1995). If we conclude that the district court lacked subject matter jurisdiction, we have no choice but to remand the cases to state court. *See* 28 U.S.C. § 1447(c) ("If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded."). We review questions of federal

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[21] Defendants and third-party defendants also cross-appealed, seeking modification of the district court judgment to incorporate the protections of the Uniform Foreign Money-Judgments Recognition Act and equivalent common law rules. Defendants later withdrew their request to modify the district court judgment after Plaintiffs conceded that nothing in the district court's orders or the agreements submitted by Defendants, as required by those orders, deprives Defendants of the protections of those laws.

subject matter jurisdiction de novo. *See* ***United States v. Teran,*** 98 F.3d 831, 833-34 (5th Cir. 1996).

The district court based its jurisdiction solely on Dead Sea's presence in the cases, concluding that Dead Sea was a "foreign state" entitled to remove to federal court and that its waiver of sovereign immunity conferred jurisdiction. Under the express provisions of 28 U.S.C. § 1330, the district courts are vested with original jurisdiction of civil actions against a foreign state as defined by § 1603(a), as to which the foreign state is not entitled to immunity under §§ 1605-1607. Furthermore, according to the federal removal statutes, a foreign state, as defined in 28 U.S.C. § 1603(a), may remove any civil action brought against it in a state court. *See* 28 U.S.C. § 1441(d). Section 1603 provides in pertinent part:

> (a) A "foreign state", . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . , nor created under the laws of any third country.

28 U.S.C. § 1603. Dead Sea is not "a political subdivision of a foreign state;" therefore, to pass muster as a foreign

state, it must be an "agency or instrumentality of a foreign state as defined in subsection (b)." *Id.* None of the parties question that Dead Sea meets the first and third requirements of that subsection; the only issue is whether a majority of Dead Sea's shares are owned by a foreign state, as required by (b)(2).

Indisputably a foreign state, the State of Israel owns 75.3% of Israel Chemicals Limited, an entity which owns 88.2% of Dead Sea Works Limited, which in turn owns 100% of Dead Sea. Through this tiered structure, there is no question that Israel indirectly owns a majority interest in Dead Sea. Plaintiffs insist, however, that indirect ownership is insufficient to qualify an entity for foreign state status. We disagree. Based on our reading of the statute, we discern nothing to support the proposition that indirect ownership of the requisite percentage precludes an entity from qualifying as a foreign state.

The plain language of the statute simply requires "ownership" by a foreign state. It draws no distinction between direct and indirect ownership; neither does it expressly impose a requirement of direct ownership. Indeed, we have previously indicated that indirect ownership is sufficient to confer foreign state status. In ***Linton v. Airbus Industrie***, we stated:

> [T]he resolution of the Airbus Defendants' claim of immunity turns on whether through "tiering" a foreign state's ownership interest can be attributed when that foreign state did not own a majority interest in the company that held the ownership interest in Airbus. . . . [Section 1603], however, erects no explicit bar to the methods

> by which a foreign state may own an instrumentality, merely requiring that the *entity claiming immunity* – not its parent – have a "majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof." There is no mention of "voting" or "control" majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving.

30 F.3d 592, 598 n.29 (5th Cir. 1994) (citations omitted). Should any doubt remain concerning this Circuit's position on tiering or indirect ownership, we squarely hold today that indirect or tiered majority ownership is sufficient to qualify an entity as a foreign state, assuming that all other requirements are met. In so doing, we join at least two other Circuits that have considered the issue and reached the same conclusion. *See* ***In re Air Crash Disaster Near Roselawn, Ind. on Oct. 31, 1994,*** 96 F.3d 932, 941 (7th Cir. 1996); ***Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.,*** 10 F.3d 425, 426-27 (7th Cir. 1993); and ***Gould, Inc. v. Pechiney Ugine Kuhlmann,*** 853 F.2d 445, 449-50 (6th Cir. 1988). *But see* ***Gates v. Victor Fine Foods,*** 54 F.3d 1457, 1462 (9th Cir. 1995). We hold, therefore, that Dead Sea is a foreign state for purposes of the FSIA and can create federal subject matter jurisdiction in actions that it properly removes to federal court. We turn next to consider the validity of Dead Sea's removals.

B. Removal

1. Standard of Review

In dismissing the cases for forum non conveniens, the district court implicitly denied plaintiffs' motions to remand. We review the district court's refusal to remand

de novo. *See Herron v. Continental Airlines, Inc.*, 73 F.3d 57, 58 (5th Cir. 1996).

2. Removal and Texas Rule of Civil Procedure 38(a)

In the "over thirty days" cases, Texas Rule of Civil Procedure 38(a) required state court leave to serve third-party petitions on Dead Sea. Even though the required leave was not obtained before removal, the district court upheld the validity of Dead Sea's removals by relying on the post-removal orders of two federal magistrate judges who granted leave to implead Dead Sea pursuant to Federal Rule of Civil Procedure 14.

Plaintiffs contend that the district court erred in relying on those orders.[22] Plaintiffs' logic proceeds as follows: (1) at the time of removal, the state court had not granted leave to serve Dead Sea, so Dead Sea was not a party in state court; (2) as a non-party, Dead Sea could not remove to federal court; (3) without Dead Sea's presence in federal court, there was no federal subject matter jurisdiction; and (4) in the absence of subject matter jurisdiction, (a) the magistrate judges had no authority to issue post-removal orders, and (b) the district court had no choice but to remand.

In the face of the district court's ruling that there had to have been state court leave to serve the third-party

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[22] Because state court leave to serve the third-party petitions was not required in the "under thirty days" cases, Plaintiffs do not challenge their removal on the basis of a failure to comply with Rule 38(a).

petitions on Dead Sea and that the removals were, therefore, premature, we recognize the logical force of Plaintiffs' argument. Nevertheless, we reject Plaintiffs' desired result because, contrary to the district court and Plaintiffs' view, the removals were not premature. Generally, service of process is not an absolute prerequisite to removal. Section 1446(b) expressly provides for removal of a civil action or proceeding within thirty days after the receipt by the defendant, "through service or otherwise, of a copy of an amended pleading, motion, or order or other paper from which it may first be ascertained that the case is one which is or has become removable." We read § 1446(b) and its "through service or otherwise" language as consciously reflecting a desire on the part of Congress to require that an action be commenced against a defendant before removal, but not that the defendant have been served.[23] Indeed, 28 U.S.C. § 1448, which provides that service may be completed in district court for any removed case from state court in which any one or more of the defendants was not served with process or in which the service was not perfected prior to removal, reinforces a less demanding view of the service "requirement" prior to removal. And under Texas law, an action has commenced when a petition is filed. *See* Tex. R. Civ. P. 22.

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[23] In ***Murphy Bros. v. Michetti Pipe Stringing,*** 119 S. Ct. 1322 (1999), the Supreme Court found that mere receipt of a complaint unattended by any formal service did not trigger a defendant's time to remove a case from state court. But the decision did not address whether service was a prerequisite for a defendant to be able to remove a case.

Moreover, the removal statute pertaining to a FSIA entity, does not refer to a served party, or even the term "party," and it does not differentiate between parties who have been served and those who have not. *See* 28 U.S.C. § 1441(d). Instead, that removal statute merely states that "[a]ny civil action brought in a State court against a foreign state . . . may be removed by the foreign state to the district court. . . . " In light of the fact that Texas views an action as having commenced when a petition is filed, Defendants' filing of their third-party claims initiated civil actions against Dead Sea, which allowed for the instant cases to be removed under § 1441(d).[24]

Accordingly, Defendants' failure to seek leave under Rule 38(a) to serve the third-party petitions on Dead Sea did not materially affect Dead Sea's right to remove the instant cases from state court, and the removals were not improper. Because service was not a prerequisite to the removal of the "over thirty days" cases, we need not

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[24] In the case of a third-party petition, one might argue that under Texas law such a complaint should be viewed differently than an initial petition with respect to when an action has commenced. That is, a third-party action should not be viewed as having commenced until the third-party petition has been filed and served. Rule 22, however, makes no distinction between an initial petition and a third-party petition. The filing of both kinds of petitions commences an action. Additionally, the history of Rule 38(a) and third-party petitions indicates that any distinction between the two kinds of petitions, which may have existed in the past, regarding the commencement of an action was likely eviscerated by amendments enacted in 1984. Before that year, a party had to seek leave of court to file and to serve a third-party petition. *See* Tex. R. Civ. P. 38(a) (Vernon 1979, amended 1984). After the amendments, only leave to serve is required. *See* Tex. R. Civ. P. 38(a).

address in *Rodriguez* whether the Standard Fruit entities' answers became effective for purposes of Rule 38(a) only after the state court overruled their special appearances.

3. Fraudulent or Collusive Joinder

As another basis for remand, Plaintiffs insist that defendants "fraudulently" joined Dead Sea for no purpose but to have it invoke FSIA jurisdiction as Defendants' ticket for admission into federal court. For support, they refer to: 1) the speed with which the removals occurred; 2) the post-removal agreements between Defendants and Dead Sea; and 3) two of their amended petitions, which expressly state that they are not asserting any claims arising out of products attributable to Dead Sea.

We have normally confronted the fraudulent joinder doctrine when a defendant removes a case based on diversity jurisdiction and charges that the plaintiff fraudulently joined a non-diverse defendant to try to prevent removal. That doctrine has not been applied where, as here, a third-party, foreign sovereign is alleged to have been joined willingly and cooperatively to create jurisdiction as a basis for removal. Recognizing this, the district court pressed a different inquiry of the facts surrounding Dead Sea's joinder, pursuant to 28 U.S.C. § 1359, which prohibits federal jurisdiction "in a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court." "Section 1359 is designed to prevent the litigation of claims in federal court by suitors who by sham, pretense, or other fiction acquire a spurious status

that would allow them to invoke the limited jurisdiction of the federal courts." ***Nolan v. Boeing Co.***, 919 F.2d 1058, 1067 (5th Cir. 1990). Its purpose is "to prevent the manipulation of jurisdictional facts where none existed before." ***Id.*** And it has generally been restricted to circumstances involving assignment of interests from non-diverse to diverse parties to collusively create diversity jurisdiction. *See, e.g.*, ***Kramer v. Caribbean Mills, Inc.***, 89 S. Ct. 1487 (1969). Because Plaintiffs did not aver that Defendants had manufactured Dead Sea's status as a foreign sovereign or their claims for contribution or indemnity against Dead Sea, the district court was not persuaded that any jurisdictional facts had been collusively manipulated in contravention of § 1359. We believe that the district court was correct in holding that § 1359 was not applicable.

On appeal, Plaintiffs do not appear to challenge the district court's § 1359 analysis. Rather, they question the district court's reliance on that statute as opposed to an analysis predicated on the fraudulent joinder doctrine. As we previously noted, the district court declined to apply that doctrine because it perceptively realized that fraudulent joinder is normally reserved for cases where a third party is alleged to have been joined to defeat diversity jurisdiction as a basis for removal. Accordingly, we are wary of recognizing the applicability of that judicially constructed doctrine in a new context. Moreover, whether we ought to apply the fraudulent joinder doctrine to situations where a third-party, foreign sovereign is alleged to have been joined willingly and cooperatively to create jurisdiction as a basis for removal is complicated by the doctrine's intersection with Congress's paramount desire that a foreign sovereign have access to a federal

forum to ensure uniformity in procedure and substance. *See, e.g., Nolan,* 919 F.2d at 1065. That is, to craft a fraudulent joinder rule to an FSIA entity's right to remove an action from state court would conflict with Congress's intent. We need not, and do not, resolve these issues today, for it is apparent that even if the fraudulent joinder doctrine were to apply to the instant case, Plaintiffs have failed to establish that Dead Sea was fraudulently joined.

In those more typical fraudulent joinder cases where a party has been joined to defeat removal, the burden of persuasion is on the one who cries fraudulent joinder.[25] *See* ***B., Inc. v. Miller Brewing Co.,*** 663 F.2d 545, 549 (5th Cir. Unit A Dec. 1981). To establish fraudulent joinder, the party crying foul must show that there is no reasonable probability of recovery against the joined party or that there has been outright fraud in the pleadings of jurisdictional facts. *See* ***id.*** If there is no arguably reasonable basis for believing that liability may be established against the

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[25] In the more typical fraudulent joinder case, the party crying fraudulent joinder is also the party removing the case. Because the party invoking removal jurisdiction has the burden of establishing federal court jurisdiction, *see* ***Frank v. Bear Stearns & Co.,*** 128 F.3d 919, 921-22 (5th Cir. 1997), one might argue that the burden of persuasion should still be with the party who removed the case rather than with the party seeking remand but charging fraudulent joinder. Such an argument, however, presumes that the removing party has not already satisfied its burden to establish federal court jurisdiction. After the removing party has satisfied its burden to establish federal court jurisdiction, the burden of persuasion with respect to the issue of fraudulent joinder to create federal court jurisdiction shifts to the party charging fraudulent joinder.

joined party, then remand is appropriate. *See* ***id.*** at 550. Normally, a court reviewing allegations of fraudulent joinder should refrain from conducting an evidentiary hearing but may utilize a summary judgment-like procedure. ***See Burchett v. Cargill,*** 48 F.3d 173, 176 (5th Cir. 1995).

To support their fraudulent joinder allegations, Plaintiffs' rely upon three main points: 1) the speed with which the removals occurred; 2) the post-removal agreements between Defendants and Dead Sea; and 3) two of Plaintiffs' amended state court petitions, which expressly state that they are not asserting any claims arising out of products attributable to Dead Sea. With respect to the first point, the intervals between the filing of the third-party petitions by Defendants and the filing of the notices of removal by Dead Sea were short, but in our view a short time interval in and of itself is not enough to establish fraudulent joinder. Indeed, opposing parties often notify each other about pending petitions and arrange for their convenient delivery. *See, e.g.*, 28 U.S.C. § 1608(b)(1) (contemplating special arrangements for service by parties suing agencies or instrumentalities of foreign states). As for Plaintiffs' second point, the post-removal agreements between Defendants and Dead Sea were dated nearly sixteen months after the filing of the third- party petitions against Dead Sea in state court and the removal of those cases. There is nothing in the record reflecting any negotiation and agreement between Defendants and Dead Sea prior to the filing of the third-party petitions and the notices of removal. Absent such proof, Plaintiffs have not established that no cause of action

could possibly have been asserted against Dead Sea by Defendants at the time of removal.

Plaintiffs' third basis for fraudulent joinder, however, merits further discussion. At the time of removal, in two of the dismissed cases, ***Jorge*** and ***Rodriguez***, the latest state court amended petitions expressly stated that Plaintiffs were not asserting any "claims because of exposure to DBCP or DBCP-containing products designed, manufactured, marketed, distributed, or used by Dead Sea Bromine Co., Ltd., Ameribrom, Inc., Israel Chemical Co., Ltd., Dead Sea Works, Ltd., and the State of Israel." The critical issue becomes what law determines the effect of those disclaimers. Without explanation, Plaintiffs seem to think that Texas law applies to this determination and dictates the outcome of any fraudulent joinder analysis.[26] Indeed, the only affidavit that either Plaintiffs or Defendants refer to in their briefs with respect to the choice of law issue does not support Plaintiffs' position but actually suggests the opposite. Defendants, on the other hand, make a blanket assertion that the relevant choice of law for determining whether a party was fraudulently joined in a DBCP-related case is the law of the country where the plaintiff was exposed to DBCP, i.e., Honduras in the case of ***Rodriguez*** and various foreign countries in the case of ***Jorge***. For support, they cite to a decision out of the Eleventh Circuit. *See* ***Cabalceta v. Standard Fruit Co.***, 883 F.2d 1553, 1562 (11th Cir. 1989). In ***Cabalceta***,

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[26] The only legal authority that Plaintiffs refer to is an order in an unrelated DBCP case by a Texas state court judge denying certain defendants motion to apply Costa Rican law. That order, though, does not state that Texas law, or any other law, is the governing law.

several Costa Rican plaintiffs brought suit in Florida state court against several defendants, including many in the present appeals, for injuries from exposure to DBCP. The defendants removed the case to federal district court where it was ultimately dismissed on forum non conveniens. Among the issues on appeal was whether the plaintiffs had fraudulently joined one of the defendants, Dole Fresh Fruit Co. ("Dole"), to defeat removal. To determine whether the plaintiffs had a colorable cause of action, the district court applied Florida law. The plaintiffs charged that this was error because when the district court dismissed the case on forum non conveniens, it ruled that Costa Rican law would apply. Noting that the plaintiffs' pleadings at the time of removal did not definitely assert that they were proceeding against Dole under Florida law, the Eleventh Circuit agreed with the plaintiffs and reversed, remanding the fraudulent joinder issue so that the plaintiffs' cause of action against Dole could be evaluated under Costa Rican law.

We find ***Cabalceta*** instructive but not dispositive of the instant cases. We note first that Plaintiffs have not alleged in either ***Jorge*** or ***Rodriguez*** that their claims are made under the laws of any particular state or nation. Next, we turn to the Texas law of conflicts for guidance as Texas is the state in which the forum district court sits. *See* ***W.R. Grace & Co. v. Continental Cas. Co.,*** 896 F.2d 865, 873 (5th Cir. 1990). In ***Gutierrez v. Collins,*** 583 S.W.2d 312, 318 (Tex. 1979) (Johnson, J.), the Texas Supreme Court adopted the most significant relationship test as enunciated in sections 6 and 145 of the Restatement (Second) of Conflicts as governing all conflicts cases sounding in tort. Those sections provide:

§ 6. Choice of Law Principles

(1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.

(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

(a) the needs of the interstate and international systems,

(b) the relevant policies of the forum,

(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,

(d) the protection of justified expectations,

(e) the basic policies underlying the particular field of law,

(f) certainty, predictability and uniformity of result, and

(g) ease in the determination and application of the law to be applied.

§ 145. The General Principle

(1) The rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties under the principles stated in § 6.

(2) Contacts to be taken into account in applying the principles of § 6 to determine the law applicable to an issue include:

> (a) the place where the injury occurred,
>
> (b) the place where the conduct causing the injury occurred,
>
> (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and
>
> (d) the place where the relationship, if any, between the parties is centered.
>
> These contacts are to be evaluated according to their relative importance with respect to the particular issue.

In addition, § 173 of the Restatement (Second) of Conflicts states that "[t]he law selected by application of the rule of § 145 determines whether one tortfeasor has a right to contribution or indemnity against another tortfeasor." At least one court has interpreted that section to mean that the source of law governing the primary liability claim is also the source of law governing the contribution claim. *See* ***50-Off Stores, Inc. v. Banque Paribas (Suisse) S.A.,*** No. SA-95-CA-159, 1997 WL 790739, at *12 (W.D. Tex. May 20, 1997); *cf.* ***Marathon Pipe Line Co. v. Drilling Rig Rowan/Odessa,*** 761 F.2d 229, 235 (5th Cir. 1985) ("This court has held that the body of law establishing the indemnitee's primary liability governs his claim for indemnity or contribution against a third party.").

Our evaluation of the choice of law issue under these prescribed rules leads us to conclude that Texas law would not qualify as the appropriate source of law. Among other things, more than 99 percent of the ***Jorge*** and ***Rodriguez*** plaintiffs are citizens of another country and not of the United States. All of the plaintiffs' injuries

occurred in various foreign countries, principally Honduras, and those foreign countries obviously have an interest in protecting the rights and welfare of their citizens. And even if the source of law governing Defendants' contribution claims were different than that for governing the primary liability issue, our review suggests no reason why Texas law would necessarily be the preferred choice. As the party crying foul, Plaintiffs have the burden of proof and persuasion to show that there is no arguably reasonable basis for believing that liability may be established against Dead Sea. Plaintiffs have not cited us to any case law or statutory provision of any jurisdiction, other than Texas, likely to be chosen as the source of law for determination of (i) the Plaintiffs' liability claim against the various Defendants, (ii) the claims for indemnity or contribution among the various Defendants, or (iii) the effects of Plaintiffs' disclaimer respecting Dead Sea on any of the foregoing.

Given the multiplicity of differing provisions that the various systems of jurisprudence in the countries involved in this litigation have on the subjects of primary tort liability, apportionment of liability among joint tortfeasors, indemnity and contribution, and the disclaimer in this case, and given the incremental nature of the claimed exposure, the numerous sources of DBCP's going into the particular products produced by the manufacturing Defendants, the apparently very small and undifferentiated percentage attributable to Dead Sea, and the various quantities of product that each grower Defendant could have purchased from any particular manufacturer, we conclude that Plaintiffs have failed to sustain their burden. Therefore, we are unable to conclude that

Defendants fraudulently or collusively joined Dead Sea to create federal court jurisdiction and to remove their cases.[27]

C. Rule 60(b)(2) And The Motion To Sever

Plaintiffs' final attempt for relief pertains to the district court's denial of their Motion for Relief from Final Judgment pursuant to Federal Rule of Civil Procedure 60(b)(2). That motion was filed subsequent to Plaintiffs' discovery of the post-removal agreements between Defendants and Dead Sea. According to Plaintiffs, those agreements illustrate 1) that there was fraudulent or collusive joinder, and 2) that Defendants no longer have any valid claims against Dead Sea and, hence, no basis for federal court jurisdiction. Apparently, intertwined with the denial of the Rule 60(b)(2) motion was another ruling denying Plaintiffs' request, in the alternative, to sever the third-party claims from the primary claims and to remand those primary claims back to state court. We review both of the district court's denials for abuse of discretion. *See* Fed.R.Civ.P. 14 advisory committee's note (stating that a district court has discretion with respect to severance of a third-party claim); ***Barrs v. Sullivan,*** 906 F.2d 120, 121 (5th Cir. 1990) ("The standard of review is whether the district court plainly abused its discretion in denying the rule 60(b) motion.").

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[27] Because Dead Sea is an agency or instrumentality of a foreign state and because Defendants did not prematurely remove their cases or fraudulently implead Dead Sea, we need not address Defendants' other arguments for removal and subject matter jurisdiction.

Under Rule 60(b)(2), "on motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for . . . newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." Due to our conclusions with regard to the fraudulent joinder allegations, we find no abuse of discretion based on Plaintiffs' first contention that the post-removal agreements illustrate fraudulent or collusive joinder. As for Plaintiffs' second contention that the agreements demonstrate that Defendants have no valid claims against Dead Sea and, thus, no basis for federal court jurisdiction, we agree with the district court that there is still a case or controversy between Defendants and Dead Sea. Although the agreements cap the maximum liability that Dead Sea may owe to Defendants for their third-party claims, the agreements do not definitely outline what the actual liability is and Dead Sea is not barred from still contesting its liability. Accordingly, we conclude that the district court did not abuse its discretion when, confronted with the agreements between Defendants and Dead Sea, it denied Plaintiffs' Rule 60(b)(2) motion.

Lastly, the district court did not abuse its discretion when it denied Plaintiffs' request to sever Defendants' third-party claims from the primary claims and to remand those primary claims to state court. Indeed, at least one other circuit has held that a district court has no discretion to remand a plaintiff's claims when a FSIA third-party defendant has removed the third-party and primary claims to federal court. *See In re Surinam Airways Holding Co.*, 974 F.2d 1255, 1260 (11th Cir. 1992). Although we decline to address the specifics of that holding at this

time, the Eleventh Circuit's decision suggests that the district court's decision was not an abuse of discretion. Furthermore, we note that there was no indication that the third-party claims unduly complicated or overburdened the primary claims. On the contrary, policy interests such as efficiency warranted the disposition of all those claims together. Thus, we find no abuse of discretion in the district court's refusal to sever the third-party claims from the primary claims and to remand those primary claims to state court.

III. CONCLUSION

Initially, we hold that the majority ownership requirement for an entity to qualify as a "foreign state" under the FSIA is satisfied by tiered or indirect majority ownership to the same extent that it is satisfied by direct ownership. Therefore, we determine that Dead Sea is a "foreign state."

Next, we conclude that Dead Sea did not prematurely remove the instant cases, notwithstanding Defendants' failure to seek leave in state court to serve Dead Sea. Service was unnecessary to trigger Dead Sea's right, as a FSIA entity, to remove under the removal statute.

As for Plaintiffs' fraudulent joinder argument, we do not believe that the speed with which the removals occurred or the post-removal agreements between Defendants and Dead Sea are indicative of that reprobated tactic. With respect to the *Jorge* and *Rodriguez* cases, the mere inclusion of disclaimers was insufficient to satisfy Plaintiffs' burden as to fraudulent joinder. Plaintiffs failed

to establish that Texas law or the law of any other jurisdiction precluded Defendants from asserting a cause of action against Dead Sea.

Finally, the district court did not abuse its discretion when it denied Plaintiffs' Rule 60(b)(2) motion and their request to sever the third-party claims from the primary claims and to remand those primary claims to state court.

AFFIRMED.[28]

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[28] During the pendency of this appeal, the parties have filed numerous motions that have been held in abeyance. Many of those motions pertain to various settlement agreements that have been entered into by some, but not all, of the plaintiffs with some, but not all, of the defendants in each of the cases involved in this appeal. Among those motions pertaining to the various settlement agreements, several seek to dismiss this appeal due to those settlements. Other parties to this appeal have filed objections to those motions for dismissal. None of the consummated settlements required our approval as a condition of settlement, and none of the settlements required dismissal of this appeal as a condition of settlement. Under those circumstances, we conclude that the most appropriate course of action is to deny all motions for dismissal of this appeal based on settlement; however, denial of those motions for dismissal should not be deemed or construed by any party as indicating our position, either pro or con, as to the validity or binding effect of those settlements. Finally, all other pending motions are dismissed as moot.

United States District Court,
S.D. Texas,
Houston Division.

Franklin Rodriguez DELGADO, et al., Plaintiffs,

v.

SHELL OIL CO., et al., Defendants.

Civ. A. No. H-94-1337.

June 30, 1995.

Fred Misko, Charles Siegel, Misko, Howie & Sweeney, Dallas, TX, Stephen D. Susman, James McCartt, Michael A. Lee, Susman Godfrey, Houston, TX, Harold W. Nix, Edward L. Hohn, Harold Nix & Associates, Daingerfield, TX, Wayne Fisher, Jim Huguenard, Fisher, Gallagher & Lewis, Houston, TX, John McEldowney, Greer, Herz & Adams, Galveston, TX, James W. Bradford, Jr., Angleton, TX, Joseph C. Kohn, Myles H. Malman, Martin J. D'Urso, Kohn, Nast & Graf, P.C., Philadelphia, PA, Thomas H. Hart, III, Alkon, Rhea & Hart, St. Croix, VI, Ramon Garcia, Dalinda G. Quintana, Law Office of Ramon Garcia, P.C., Edinburg, TX, Enrique Alvino Garza, Hebronville, TX, J.A. "Tony" Canales, Canales & Simonson, Corpus Christi, TX, Vaughn O. Stewart, Lake Jackson, TX, for plaintiffs.

John L. Hill, Jr., J. Michael Dorman, Richard Staff, James E. Essig, Liddell, Sapp, Zivley, Hill & Laboon, Burt Ballanfant, Shell Oil Co., Houston, TX, Morris Atlas, Lisa Powell, Atlas & Hall, L.L.P., McAllen, TX, Richard R. Gonzales, Hebronville, TX, Robert W. Weber, Atchley, Russell, Waldrop & Hlavinka, L.L.P., Texarkana, TX, John R. Gilbert, Gilbert, Gilbert & Boyd, P.C., Angleton, TX, for Shell Oil Co.

D. Ferguson McNeil, Vinson & Elkins, Charles W. Schwartz, Houston, TX, Stephen C. Lewis, Charles M. O'Connor, Mariah Baird, Landels, Ripley & Diamond, San Francisco, CA, Michael M. Phillips, Angleton, TX, T. John Ward, Calvin Capshaw, Brown, McCarrol & Oaks Hartline, Longview, TX, for Occidental Chemical Corp.

Terence M. Murphy, James S. Teater, Michael L. Rice, Jones, Day, Reavis & Pogue, Dallas, TX, Wiley Thomas, Angleton, TX, for Standard Fruit Co., Dole Fresh Fruit Co.

F. Walter Conrad, Michael Brem, Baker & Botts, L.L.P., Houston, TX, Patrick Reilly, Galveston, TX, J.G. Adami, Jr., Perkins, Oden, Warbuxton, McNeill, Adami & Paisley, Alice, TX, John R. Gilbert, Gilbert, Gilbert & Boyd, P.C., Angleton, TX, Eduardo R. Rodriguez, Rodriguez, Colvin & Chaney, Brownsville, TX, Robert Rolston, Bird Old III, Old, Rolston & Old, Mount Pleasant, TX, T. John Ward, Calvin Capshaw, Brown, McCarrol & Oaks Hartline, Longview, TX, for Dow Chemical Co.

Samuel E. Stubbs, William D. Wood, Fulbright & Jaworski L.L.P., Houston, TX, for Chiquita Brands and Chiquita Brands Intern., Inc.

James J. Juneau, Pamela K. Estes, Strasburger & Price, L.L.P., Houston, TX, Robert T. Greig, Howard S. Zelbo, Cleary, Gottlieb, Steen & Hamilton, New York City, for Del Monte Fresh Produce, N.A. and Del Monte Tropical Fruit Co.

Edward F. Fernandes, Solar & Fernandes, L.L.P., Houston, TX, for Programa Nacional de Banano.

Scott M. Hendler, The Hendler Law Firm, Austin, TX, Don Weitinger, Carrie Weitinger, Weitinger & Weitinger,

Houston, TX, Michael Brickman, Ness, Motley, Loadholt, Richardson & Poole, P.A., Charleston, SC, for intervenors.

Jeffrey H. Marsh, Mattingly & Marsh, Houston, TX, Robert Crow, Boornazian, Jensen & Garthe, Oakland, CA, for Amvac Chemical Corp.

Laurence E. Best, Best, Koeppel & Klotz, Houston, TX, Laurence E. Best, Best, Koeppel & Klotz, New Orleans, LA, for interveners (Hondurans).

Thomas J. Brandt, Bradley W. Cole, Robert A. Shults, Sheinfeld, Maley & Kay, P.C., Houston, TX, Peter R. Paden, Teitelbaum, Hillde, Rodman, Paden & Hibsher, P.C., New York City, for third- and fourth-party defendants, Dead Sea Bromine Co., Ltd., Bromine Compounds, Ltd., and Ameribrom, Inc.

MEMORANDUM AND ORDER

LAKE, District Judge.

Pending before the court is the Motion to Remand or, in the Alternative, Motion to Sever and Remand of plaintiffs (Docket Entry No. 16). Plaintiffs argue that the court must remand this action pursuant to 28 U.S.C. § 1447(c) because the court lacks subject matter jurisdiction. Alternatively, plaintiffs ask the court to sever claims concerning the recently impleaded party that may have conferred subject matter jurisdiction and to remand the remaining claims. Also pending is the Motion to Consolidate of defendant, Shell Oil Co. (Docket Entry No. 19).

I. Background

On January 13, 1993, plaintiffs, residents of Costa Rica, Panama, and Nicaragua, filed a petition in the 212th District Court of Galveston County, Texas. They sought damages from a variety of defendants for injuries stemming from alleged exposure to a nematocide, dibromochloropropane (DBCP), while working on banana plantations in those countries. Although plaintiffs pursued remedies available exclusively under state law, defendants removed the action to the Galveston division of this district on the basis that the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) preempted those claims. Judge Kent found that FIFRA did not preempt plaintiffs' claims and remanded the action on April 19, 1993. *Rodriguez v. Shell Oil Co.*, 818 F.Supp. 1013 (S.D.Tex.1993). All further proceedings, including consolidation of the action with another DBCP case,[1] were conducted by the state court until March 15, 1994, when one of the defendants, Del Monte Fresh Produce, N.A., filed a third-party petition against Dead Sea Bromine Co. Ltd. (Dead Sea), an Israeli company. Dead Sea removed the action to the Galveston division pursuant to 28 U.S.C. § 1441(d) because Dead Sea is a "foreign state" within the meaning of the FSIA.[2] The case was assigned to Judge

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[1] The January 7, 1994, Order consolidating this action with *Aguilar v. Shell Oil Co.*, No. 93-CV-0658 (56th Dist.Ct., Galveston County, Texas), is attached as Exhibit 19 to Dead Sea Bromine's First Supplement to the Record Following Removal (Docket Entry No. 11).

[2] The Foreign Sovereign Immunities Act was originally enacted as Pub.L. No. 94-583, 90 Stat. 2892 (1976). It is now codified as amended at 28 U.S.C. §§ 1602-1611.

Kent as Civil Action No. G-94-193. Upon Judge Kent's recusal (Docket Entry No. 8) the case was transferred to the Houston division and randomly assigned to the undersigned judge (Docket Entry No. 14).

II. Standard of Review

"Section 1447(c) provides two grounds for remand: (1) a defect in removal procedure and (2) lack of subject matter jurisdiction." *Burks v. Amerada Hess Corp.*, 8 F.3d 301, 303 (5th Cir.1993). When considering a motion to remand the removing party bears the burden of showing that removal was proper. *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir.1988), appeal after remand, 915 F.2d 965 (5th Cir.1990), aff'd, 503 U.S. 131, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992). "This extends not only to demonstrating a jurisdictional basis for removal, but also necessary compliance with the requirements of the removal statute." *Albonetti v. GAF Corporation-Chemical Group*, 520 F.Supp. 825, 827 (S.D.Tex.1981). Because removal jurisdiction "raises significant federalism concerns," *Willy*, 855 F.2d at 1164, courts must construe removal statutes "narrowly, with doubts resolved in favor of remand to the state court." *Jefferson Parish Hosp. Dist. No. 2 v. Harvey*, 788 F.Supp. 282, 283-84 (E.D.La.1992). If there is any doubt that a right to removal exists, "ambiguities are to be construed against removal." *Samuel v. Langham*, 780 F.Supp. 424, 427 (N.D.Tex.1992).

III. Discussion

A. Was removal properly achieved?

Plaintiffs argue that the case was improperly removed because Dead Sea is not a foreign state. 28 U.S.C. § 1441(d) provides foreign states an absolute right to remove cases in which they are a party.[3] The FSIA contains a detailed definition of a foreign state.

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country.

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[3] *See*, e.g., *Talbot v. Saipem A.G.*, 835 F.Supp. 352, 353 (S.D.Tex.1993). In *Nolan v. Boeing Co.*, 919 F.2d 1058 (5th Cir.1990), cert. denied, 499 U.S. 962, 111 S.Ct. 1587, 113 L.Ed.2d 651 (1991), the Fifth Circuit held that § 1441(d) affords third-party defendants the right to remove not only the third-party claims, but the entire case.

28 U.S.C. § 1603. Dead Sea has introduced uncontradicted evidence that it satisfies the first and last elements of § 1603(b). The evidence demonstrates that Dead Sea is a corporation organized under the laws of Israel[4] and plaintiffs do not contend that Dead Sea is a citizen of a State of the United States or created under the laws of a third country. Instead, plaintiffs argue that despite the disjunctive criteria of § 1603(b)(2), Dead Sea's proof that Israel indirectly owns a majority of its shares[5] is insufficient to satisfy § 1603(b)(2). Citing *Edlow Int'l v. Nuklearna Elektrarna Krsko (NEK)*, 441 F.Supp. 827 (D.D.C.1977), plaintiffs argue that the court should also require Dead Sea to prove that it discharges a governmental function or that the State of Israel exercises direct control over its operations.

Plaintiffs' argument is unconvincing. In *Edlow* a Bermudan nuclear fuels broker sued NEK, "an independent self-managing organization of workers linked in labour by common interests and organized in basic organizations of associated labour" chartered by the Socialist Federal Republic of Yugoslavia to build and operate a nuclear

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[4] Affidavit of Bat-Sheva Golan, attached as part of Exhibit 1-A to Memorandum of Law of Third-Party Defendant Dead Sea Bromine Co., Ltd. in Opposition to Plaintiffs' Motion to Remand (Dead Sea's Opposition; Docket Entry No. 31).

[5] Dead Sea has introduced uncontradicted evidence that Israel owns, albeit indirectly, roughly two-thirds of the outstanding shares of Dead Sea. *Id.* The fact that Israel's ownership interest in Dead Sea is "indirect" because Dead Sea is a wholly-owned subsidiary of an entity in which Israel owns an indirect majority interest is immaterial. *See*, e.g., *Talbot v. Saipem A.G.*, 835 F.Supp. 352, 353 n. 2 (S.D.Tex.1993).

power plant, to resolve a dispute over NEK's obligation to pay the broker its fee. 441 F.Supp. at 831.NEK argued that the court lacked subject matter jurisdiction over the action because it was not a foreign state within the meaning of § 1603(b). The broker countered that NEK met the § 1603(b)(2) test because Yugoslavia "owned" NEK by virtue of the country's socialist political ideology that all property was "owned" by the state. In rejecting that argument the court stated that

> to accept plaintiff's argument on this point would be to characterize virtually every enterprise operated under a socialist system as an instrumentality of the state. . . . [While the FSIA's] legislative history evinces Congress' intent that the definition of "agency or instrumentality of a foreign state" be read broadly to encompass "a variety of forms, . . . " there is no suggestion that a foreign state's system of property ownership, without more, should be determinative on the question whether an entity operating within the state is a state agency or instrumentality under the [FSIA].

Id. at 831-32 (citation omitted). Faced with both a political system that forbade most private enterprise and a dearth of evidence with which to distinguish state-owned from privately held enterprises, the court was forced to improvise. It developed the test that plaintiffs now ask this court to apply; a test designed to determine whether NEK met the first § 1603(b)(2) criteria because it was an " 'organ' of the Yugoslav government" that discharged a governmental function, or whether it met the second criteria because the Yugoslav government actually exercised control over its operations in a manner indicating

that it "owned" a controlling interest in the organization. *Id.* at 832. Since the court concluded that NEK met neither of § 1603(b)(2)'s criteria, it held that NEK was not a foreign state within the meaning of § 1603(a).

Nothing in § 1603(b) or any other provision of the FSIA suggests that a corporation able to satisfy the majority ownership requirement of § 1603(b)(2) must also meet the separate test performed by the *Edlow* court. Because the FSIA "sets forth the sole and exclusive standards to be used in resolving questions of sovereign immunity raised by foreign states before Federal and State courts in the United States,"[6] this court joins those courts that have declined to judicially engraft the *Edlow* test onto the § 1603(b)(2) "ownership" inquiry.[7] Dead Sea is an agency or instrumentality of Israel because Israel owns a majority of its shares. Accordingly, Dead Sea had a right to remove the action under § 1441(d).

B. Is remand necessary even though removal was proper?

Plaintiffs argue in the alternative that even if Dead Sea's removal was proper, its immunity under the FSIA deprives the court of subject matter jurisdiction over Dead Sea. Plaintiffs urge the court to dismiss Dead Sea for lack of subject matter jurisdiction and to remand the

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[6] H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 12, reprinted in 1976 U.S.C.C.A.N. 6604, 6610; *see* also *Rodriguez v. Transnave Inc.*, 8 F.3d 284, 287 (5th Cir.1993).

[7] *See*, e.g., *Intercontinental Dictionary Series v. De Gruyter*, 822 F.Supp. 662, 673 (C.D.Cal.1993); *Yessenin-Volpin v. Novosti Press Agency*, 443 F.Supp. 849, 852-54 (S.D.N.Y.1978).

remaining claims to state court. Defendants contest plaintiffs' arguments and argue in the alternative that even if Dead Sea is immune, other bases for subject matter jurisdiction exist.

1. Does 28 U.S.C. § 1330(a) provide a basis for jurisdiction?

The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in [American] courts." *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434, 109 S.Ct. 683, 688, 102 L.Ed.2d 818 (1989). Because Congress predicated the exercise of "subject-matter jurisdiction in any . . . action [against a foreign sovereign] . . . on the existence of one of the specified exceptions to foreign sovereign immunity, 28 U.S.C. § 1330(a) [, a]t the threshold of every action in a district court against a foreign state . . . the court must satisfy itself that one of the exceptions applies. . . . " *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 493-94, 103 S.Ct. 1962, 1971, 76 L.Ed.2d 81 (1983). "[I]f none of the exceptions to sovereign immunity set forth in the FSIA applies, the district court lacks statutory subject matter jurisdiction. . . . Thus, where a case is removed based on the FSIA and section 1330, federal jurisdiction over both foreign and nonforeign parties does not attach until it is determined that the foreign sovereign lacks immunity pursuant to the FSIA." *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1065 (5th Cir.), cert. denied, 506 U.S. 867, 113 S.Ct. 193, 121 L.Ed.2d 136 (1992).

Plaintiffs have expended considerable effort to show that the court lacks subject matter jurisdiction over Dead

Sea because it is immune. Defendants, in an effort to retain the forum of their choice, have submitted an even greater volume of papers to show that Dead Sea is not immune. Dead Sea has asserted, but has submitted no papers to show, that the court lacks subject matter jurisdiction over it. Although it is true that "even if the foreign state does not enter an appearance to assert an immunity defense, a district court must still determine that immunity is unavailable under the Act," *Verlinden*, 461 U.S. at 494 n. 20, 103 S.Ct. at 1971 n. 20, the court is unwilling to determine Dead Sea's immunity status without affording Dead Sea an opportunity to speak on its own behalf. Accordingly, Dead Sea will be ordered to provide the court with whatever arguments, authorities, and evidence supporting its claim to immunity it desires to present within 20 days from the entry of this Memorandum and Order. Any party opposing Dead Sea's claim of immunity must file any papers in opposition within 40 days from the entry of this Memorandum and Order. Dead Sea will have 10 days to reply to any oppositions.

2. Is there an alternative basis for jurisdiction?

Citing a line of Fifth Circuit cases beginning with *In re Wilson Industries, Inc.*, 886 F.2d 93 (5th Cir.1989), defendants argue that the existence of independent bases for subject matter jurisdiction make remand improper even were the court to determine that Dead Sea's immunity precludes the exercise of subject matter jurisdiction under § 1330. Alternatively, citing *Williams v. M/V SONORA*, 985 F.2d 808 (5th Cir.1993), defendants urge that remand is

committed to the discretion of the court and would be inappropriate in this case.

a. Does diversity jurisdiction exist?

The parties dispute the existence of complete diversity between the plaintiffs and defendants. 28 U.S.C. § 1332(a)(2) provides that "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum of $50,000 . . . and is between . . . citizens of a State and citizens or subjects of a foreign state." Defendants argue that this test is satisfied because all defendants are citizens of various states of the United States and all plaintiffs are citizens of foreign countries. Plaintiffs argue that § 1332(a)(2) is not satisfied because one of the defendants, the Standard Fruit Co., is, for diversity purposes, a citizen of a foreign country and the presence of foreigners on both sides of the case destroys diversity. *See*, e.g., *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.*, 874 F.2d 283, 290-91 (5th Cir.1989) (complete diversity does not exist in action between a foreign plaintiff corporation and a foreign defendant corporation).

28 U.S.C. § 1332(c)(1) provides that "a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business. . . . " Plaintiffs acknowledge that Standard Fruit Co. is a citizen of Delaware, the place of its incorporation, but argue that it is also a citizen of Ecuador because that is where it maintains its principal place of business. Defendants, relying on *Cabalceta v. Standard Fruit Co.*, 883 F.2d 1553 (11th Cir.1989), counter

that nothing in § 1332(c)(1) precludes the exercise of diversity jurisdiction even if Standard Fruit Co.'s principal place of business is in Ecuador.

Because § 1332(c)(1) does not expressly apply to foreign corporations courts are divided as to its effect on foreign corporations. Some courts have concluded that § 1332(c)(1) applies only to domestic corporations. *See, e.g., Eisenberg v. Commercial Union Assur. Co.*, 189 F.Supp. 500, 502 (S.D.N.Y.1960) ("Unless a corporation is incorporated by a State of the United States it will not be deemed a citizen of the State where it has its principal place of business."). The Fifth Circuit first examined the effect of § 1332(c)(1) on foreign corporations in *Jerguson v. Blue Dot Investment, Inc.*, 659 F.2d 31 (5th Cir.1981), cert. denied, 456 U.S. 946, 102 S.Ct. 2013, 72 L.Ed.2d 469 (1982). In Jerguson the defendant was a Panamanian corporation that maintained its principal place of business in Florida, the plaintiff's home state. The court held that diversity jurisdiction did not exist. After analyzing the conflicting judicial interpretations of the section, the court concluded that congressional silence as to foreign corporations did not preclude reading § 1332(c)(1) in a way that gave effect to congressional intent to restrict the availability of diversity over all corporations that were in reality local wherever they might be incorporated.

The Fifth Circuit has continued to apply § 1332(c)(1) to cases involving foreign corporations in a manner consistent with congressional intent to limit diversity jurisdiction whenever the underlying purposes of diversity jurisdiction would not be furthered. In *Panalpina Welttransport GmBh v. Geosource*, 764 F.2d 352 (5th Cir.1985), the court, relying in part on Jerguson, explained that

neither § 1332(c)(1) nor congressional intent to restrict diversity jurisdiction is limited to cases in which a foreign corporation is really a local concern.

> Like a domestic corporation, an alien corporation may add an additional place of citizenship for diversity purposes if its principal place of business is within one of the states of the United States. . . . Through multiple places of incorporation, principal place of business, and alter ego or consolidation doctrines, a corporation may become the citizen of several places for purposes of diversity jurisdiction. Such a result is in keeping with Congress' intendment to constrict the availability of diversity jurisdiction. A party cannot, however, pick and choose among the places of citizenship ignoring one or more in an effort to preserve diversity jurisdiction. Such a practice would be contrary to the historical intent of Congress.

Id. at 354 (citations omitted). In *Chick Kam Choo v. Exxon Corp.*, 764 F.2d 1148 (5th Cir.1985), the court held that the presence of a Liberian affiliate of Exxon among the defendants defeated diversity in a suit by citizens of Singapore even though the affiliate's principal place of business was in New Jersey.

> [W]e cannot overemphasize the primary underlying purpose of the diversity statute, that is, to provide a separate forum for out-of-state citizens to protect those citizens against the prejudices of local courts and local juries by making available to them the benefits and safeguards of the federal courts. When, as in this case, an alien plaintiff sues in state court another alien (who has a principal place of business in the United

> States), the danger is remote that the alien plaintiff will benefit from local bias of state courts or juries. Thus, the underlying purpose of diversity jurisdiction simply would not be furthered by its extension under the facts of this case.

Id. at 1153 (citation omitted).

These Fifth Circuit opinions teach that when confronted with a situation in which a corporate entity – whether foreign or domestic – might fall within the ambit of § 1332(c)(1)'s limitation on diversity jurisdiction a court must determine whether the purposes of diversity jurisdiction would be advanced by affording a federal forum to that litigant. The court concludes that the primary underlying purpose of diversity jurisdiction would not be furthered by affording a federal forum to disputes between alien plaintiffs and a corporation that has a corporate charter from one of the states of the United States but maintains its principal place of business abroad.

Resolution of the parties' dispute over the existence of complete diversity will require the court to determine where the Standard Fruit Co. maintains its principal place of business by applying the "total activity test" articulated in *J.A. Olson Co. v. City of Winona, Miss.*, 818 F.2d 401 (5th Cir.1987). In *Olson* the Fifth Circuit explained that the "total activity test" is a compilation of the "nerve center" and "place of activity" tests. A court should employ a "nerve center" analysis whenever a corporation engages in

> "far-flung and varied activities which are carried on in different states." . . . In such situations, the nerve center, or corporate offices, will

> [ordinarily] clearly be the principal place of business . . . [because] the corporation's activities are dispersed to the point that no place in which the corporation conducts operations or activities can be denoted "principal."

Id. at 407 (citations omitted). When the bulk of a corporation's operations are conducted in one state while its administrative functions are conducted in another the court should use the "place of activity" analysis instead. *Id.* at 408-09.

The "total activity test" acknowledges that neither of these tests is absolute; a court must first analyze the corporation's overall activities, and even then must apply the appropriate test with some flexibility. Thus, while corporate offices are ordinarily the principal place of business of a far-flung corporation, the court might conclude otherwise when the nature of the activities at each location and the relationship between those activities and the corporation's overall purpose indicates that a more appropriate "nerve center" exists – even if that entails ignoring the formal separation between corporate entities. *Id.* at 412 ("[A] corporation's nerve center does not have to be located within the corporate shell, but can be found wherever the nerve center exists."). Likewise, if the bulk of a corporation's operations are "passive," the administrative office that oversees these "activities" may be the principal place of business even though a strict application of the "place of activity" analysis might yield the opposite result. *Id.* at 410 ("New York, the location of the corporation's offices, was therefore not only its nerve center but also the location of its primary activity, that is,

the management of its [real estate investment] assets [located in other states].").

When reviewing a motion to dismiss for lack of subject matter jurisdiction that appears to involve a need to determine factual matters not contained within the plaintiff's complaint "the district court must give [the party seeking the federal forum] an opportunity for discovery and for a hearing that is appropriate to the nature of the motion to dismiss." *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.), cert. denied, 454 U.S. 897, 102 S.Ct. 396, 70 L.Ed.2d 212 (1981). At present, the parties have merely introduced purported judicial admissions or determinations in this and other lawsuits; although some of these items are based on deposition testimony, the parties have submitted very few original evidentiary materials. As it appears that the parties have already conducted discovery on this issue, the Standard Fruit Co. will be ordered to submit within 20 days from the entry of this Memorandum and Order evidence sufficient for the court to determine where it maintains its principal place of business. Plaintiffs may file papers in opposition to Standard Fruit Co.'s submission within 40 days from the entry of this Memorandum and Order. Standard Fruit Co. will have 10 days to reply to any opposition.

b. Does federal question jurisdiction exist?

Defendants also argue that the court can exercise subject matter jurisdiction over the underlying action because that action raises at least one federal question. Defendants argue that one or more of the plaintiffs' causes of action arise under a treaty or under federal

common law because the case implicates both international law and the law of foreign relations. The court has been forced to postpone a determination of Dead Sea's immunity under the FSIA and the existence of diversity jurisdiction. Because the resolution of these questions may provide a basis for subject matter jurisdiction, the court will defer considering the existence of federal question jurisdiction until it has determined whether it has jurisdiction under 28 U.S.C. § 1380 or diversity jurisdiction.

IV. Consolidation

Shell Oil Co. has moved to consolidate *Carcamo v. Shell Oil Co.*, No. H-94-1359, also pending in the Houston division, with the instant action. Defendants also seek to consolidate *Rodriguez v. Shell Oil Co.*, No. L-94-49, now pending in the Laredo Division of the Southern District of Texas; and *Erazo v. Shell Oil Co.*, No. M-94-055, now pending in the McAllen Division of the Southern District of Texas, with this action. Since plaintiffs do not oppose consolidation of *Carcamo*, No. H-94-1359, into this action, the Motion to Consolidate of defendant, *Shell Oil Co.* (Docket Entry No. 19), will be granted as it relates to H-94-1359.

Plaintiffs complain that Shell has not yet responded to their objection to consolidation of this case with the Laredo and McAllen actions on the grounds that Shell has chosen the wrong procedural vehicle to accomplish its objective. Plaintiffs argue that interdivision consolidations within one district must be preceded by a motion to transfer venue pursuant to 28 U.S.C. § 1404(b) ("Upon

motion . . . any action . . . of a civil nature . . . may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district."). Shell will be ordered to respond to this objection within 10 days from the entry of this Memorandum and Order.

V. Conclusion and Order

Dead Sea's removal was proper under 28 U.S.C. § 1441(d) because Dead Sea is a "foreign state." Because the court is unable to determine whether Dead Sea is immune from the jurisdiction of this court Dead Sea is ORDERED to provide the court with whatever arguments, authorities, and evidence supporting its claim to immunity it desires to present within 20 days from the entry of this Memorandum and Order. Any party opposing Dead Sea's claim of immunity must file any papers in opposition within 40 days from the entry of this Memorandum and Order. Dead Sea will have 10 days to reply to any oppositions.

Because the court is unable to determine whether diversity jurisdiction exists the Standard Fruit Co. is ORDERED to submit within 20 days from the entry of this Memorandum and Order evidence sufficient for the court to determine where it maintains its principal place of business. Plaintiffs may file papers in opposition to Standard Fruit Co.'s submission within 40 days from the entry of this Memorandum and Order. Standard Fruit Co. will have 10 days to reply to any opposition.

Because the court is unable at this time to determine whether it has subject matter jurisdiction over the entire

action or over a portion of the action, plaintiffs' Motion to Remand or, in the Alternative, Motion to Sever and Remand (Docket Entry No. 16) is DENIED. The court reserves the right to consider the existence of its subject matter jurisdiction and to remand or dismiss the action or any part of the action that falls outside of its original or supplemental jurisdiction.

Shell Oil Company's motion to consolidate *Carcamo v. Shell Oil Co.*, No. H-94-1359, now pending in the Houston Division of the Southern District of Texas, with this action is GRANTED. Shell is ORDERED to respond to plaintiffs' objections to Shell's attempt to effect an interdivisional consolidation within 10 days from the entry of this Memorandum and Order.

In order to expedite a final determination of the court's subject matter jurisdiction over this action, all parties filing papers pursuant to this Memorandum and Order should not only file those papers with the clerk, but should also deliver a copy of their papers to the court's chambers. The court encourages defendants to file joint submissions whenever possible.

United States District Court,
S.D. Texas,
Houston Division.

Franklin Rodriguez DELGADO, et al., Plaintiffs,

v.

SHELL OIL CO., et al., Defendants.
Jorge Colindres CARCAMO, et al., Plaintiffs,

v.

SHELL OIL CO., et al., Defendants.
Ramon Rodriguez RODRIGUEZ, et al., Plaintiffs,

v.

SHELL OIL COMPANY, et al., Defendants.
Manuel Antonio Balderamos ERAZO, Plaintiff,

v.

SHELL OIL CO., et al., Defendants.
Juan Ramon VALDEZ, et al., Plaintiffs,

v.

SHELL OIL CO., et al., Defendants.
Isae CARCAMO, Plaintiff,

v.

SHELL OIL CO., et al., Defendants.

Civ. A. Nos. H-94-1337, H-94-1359, H-94-3248, H-94-3451, H-95-1356 and H-95-1407.

July 11, 1995.

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P.C., New York City, for third- and fourth-party defendants, Dead Sea Bromine Co., Ltd., Bromine Compounds, Ltd., and Ameribrom, Inc.

MEMORANDUM AND ORDER

LAKE, District Judge.

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I. Introduction

This action is a consolidation of several personal injury suits filed in various Texas courts pursuant to Tex.Civ.Prac. & Rem.Code Ann. § 71.031.[1] All but a few of the thousands of plaintiffs are citizens of twelve foreign countries who seek damages for injuries stemming from alleged exposure to a nematocide, dibromochloropropane (DBCP), while working on farms in 23 foreign countries. Since their inception the cases have been mired in disputes concerning the parties' choice of forum. Plaintiffs seek to have all of the cases remanded to various Texas state courts where they were originally filed so that their claims may be adjudicated there. Because each case was commenced before September 1, 1993, each is controlled by the Texas Supreme Court's decision "that the legislature . . . statutorily abolished the doctrine of forum non conveniens in suits brought under section 71.031." *Dow Chemical Co. v. Castro Alfaro*, 786 S.W.2d 674, 679 (Tex.1990), cert. denied, 498 U.S. 1024, 111 S.Ct. 671, 112 L.Ed.2d 663 (1991). Defendants seek to have a federal court maintain jurisdiction and then to dismiss the cases on the basis of forum non conveniens. To avoid this result plaintiffs have carefully sculpted their lawsuits to avoid federal jurisdiction. To the uninitiated the fact that these cases have now reached federal court might signify that defendants have achieved their objective. However, the

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[1] Section 71.031 provides a Texas forum for a personal injury or wrongful death cause of action arising from actions that took place in a foreign country belonging to a citizen of a foreign country that has equal treaty rights with the United States.

plot in this drama is much more complicated than can be appreciated by viewing just the first act. Therefore, before addressing the pending motions and the numerous and complex issues they raise, the court will first identify the players and describe the scene changes that have occurred to date.

II. Parties, Posture, and Pending Pleadings

A. All Roads Lead to Houston

1. *Delgado v. Shell Oil Co.*, No. H-94-1337

Plaintiffs in Delgado are residents of Costa Rica, Nicaragua, and Panama. They originally filed suit in the 212th District Court of Galveston County, Texas, against Shell, Chiquita Brands, Chiquita Brands International, Inc., Del Monte Fresh Produce, N.A., Del Monte Tropical Fruit Co., Dole Food Co., Inc., Dole Fresh Fruit Co., Dow Chemical Co., Occidental Chemical Corp., Standard Fruit Co., and Standard Fruit & Steamship Co. Defendants' initial attempt to remove the case to the Galveston Division of this district was rejected on April 20, 1993. *Rodriguez v. Shell Oil Co.*, 818 F.Supp. 1013 (S.D.Tex.1993) (Kent, J.) (remand required because plaintiffs' claims, even if preempted by the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), did not present a removable federal question).

On January 7, 1994, the 212th District Court consolidated *Delgado* with another DBCP case pending in Galveston County, *Aguilar v. Shell Oil Co.*, No. 93-CV-0658

(56th Dist. Ct., Galveston County, Texas).[2] Aguilar was an uncertified class action on behalf of "[a]ll persons (and their spouses) in Costa Rica who have been adversely exposed to any nematocide containing the compound 1-2-Dibromo-3-Chloropropane designed, manufactured, marketed, distributed, or sold by one or more of the Defendants[3] . . . [except] any person who has already commenced an individual civil action."[4]

On February 14, 1994, Del Monte Fresh Produce, N.A., filed its original answer. Pursuant to Tex.R.Civ.P. 38,[5] on March 15, 1994, Del Monte filed and served a

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[2] The order consolidating the two cases is attached as Exhibit 19 to Dead Sea's First Supplement to the Record Following Removal. (Docket Entry No. 11 in H-94-1377) A previous version of the Aguilar case was commenced as Cause No. 93-005796 in the 270th District Court of Harris County, Texas, on February 10, 1993. Because the plaintiff non-suited the case on March 3, 1993, before it was removed to this court by Shell on March 5, 1993, the court dismissed the case. (Memorandum and Order and Final Judgment, entered June 16, 1993, Docket Entry Nos. 13 & 14 in H-93-0644, aff'd, No. 93-2647, 20 F.3d 1170 (5th Cir. Apr. 6, 1994)).

[3] Plaintiffs in *Aguilar* named fewer defendants than plaintiffs in *Delgado*. Omitted from the list were Chiquita Brands, Chiquita Brands International, Inc., Del Monte Fresh Produce, N.A., and Del Monte Tropical Fruit Co.

[4] Plaintiffs' Second Amended Petition in *Aguilar*, attached as Exhibit 1 to Dead Sea's First Supplement to the Record Following Removal, Docket Entry No. 11 in H-94-1377, at 4, ¶ 11.

[5] Tex.R.Civ.P. 38 provides, in relevant part, that:

> At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a citation and petition to be served upon a person not

third-party petition impleading Dead Sea Bromine Co., Ltd. (Dead Sea), an Israeli company that is a "foreign state" within the meaning of the Foreign Sovereign Immunities Act (FSIA),[6] and Dead Sea's American affiliate, Ameribrom, Inc. Del Monte's third-party petition alleged that Dead Sea manufactured and sold, and Ameribrom sold, DBCP to which plaintiffs may have been exposed. Dead Sea promptly removed the action to the Galveston Division pursuant to 28 U.S.C. § 1441(d). The case was assigned to Judge Kent as Civil Action No. G-94-193. Judge Kent recused and the case was transferred to the Houston Division where it was assigned to the undersigned judge.[7]

The other defendants joined in the removal and (with the exception of Del Monte Fresh Produce, N.A.) filed cross-claims against Dead Sea, Ameribrom, and in some cases, each other. In response to plaintiffs' motion to remand defendants argued that federal subject matter jurisdiction was provided by the presence of Dead Sea in the case and by the existence of complete diversity of citizenship and federal questions. Shell also filed supplemental notices of removal asserting that plaintiffs' most

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> a party to the action who is or may be liable to him or to the plaintiff for all or part of the plaintiff's claim against him. The third party plaintiff need not obtain leave to make the service if he files the third-party petition not later than thirty (30) days after he serves his original answer.

[6] The Foreign Sovereign Immunities Act was originally enacted as Pub.L. No. 94-583, 90 Stat. 2892 (1976). It is now codified as amended, mostly, at 28 U.S.C. §§ 1602-1611.

[7] Docket Entry No. 14 in H-94-1337.

recent amended petitions and other papers recently filed by plaintiffs raised new, removable, federal questions.

In a June 30, 1994, Memorandum and Order the court concluded that Dead Sea, as a foreign sovereign, had a right to remove the case,[8] but declined to decide whether Dead Sea's presence conferred subject matter jurisdiction until Dead Sea had an opportunity to fully present its sovereign immunity arguments. The court also deferred deciding whether alternative bases for subject matter jurisdiction existed until the parties submitted additional materials demonstrating the citizenship of Standard Fruit Co.

2. *Jorge Carcamo v. Shell Oil Co.*, No. H-94-1359

Plaintiffs (including intervenor-plaintiffs) in *Jorge Carcamo* are residents of Burkina Faso, Costa Rica, Dominica, Ecuador, Guatemala, Honduras,[9] Ivory Coast, Nicaragua, Panama, the Philippines, Saint Lucia, and Saint Vincent. They advance, as an uncertified class, claims on behalf of themselves and all others "exposed to DBCP, or DBCP-containing products, designed, manufactured, marketed, distributed or used by Shell Oil Company, Dow Chemical Company, Occidental Chemical Corporation . . . or used by Standard Fruit Company, Standard Fruit and Steamship Co., Dole Food Company, Inc., Dole Fresh Fruit Company, Chiquita Brands, Inc.,

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[8] *M & O I*; Docket Entry No. 86 in H-94-1337, at 6.

[9] One person listed among the plaintiffs from Honduras apparently resides in California.

and Chiquita Brands International, Inc.,[10] between 1965 and 1990,"[11] not only in their home countries but also in Argentina, Australia, Cameroon, Indonesia, Malaysia, Mexico, Papua New Guinea, Senegal, Tanzania, Thailand, and Venezuela, with the exception of anyone who is already a plaintiff in any of selected other DBCP cases already pending. On April 5, 1994, Dow Chemical Co. filed a third-party petition against Dead Sea, Ameribrom, and the Del Monte entities. Because the petition was filed more than 30 days after Dow had filed its answer, Tex.R.Civ.P. 38 obligated Dow to obtain leave of court to serve the petition. Although Dow had not yet obtained the required leave from the 23rd District Court of Brazoria County, Texas, Dead Sea nevertheless promptly removed the case to the Galveston Division where it was assigned to Judge Kent as Civil Action No. G-94-238. Judge Kent recused on April 12, 1994, and the case was transferred to the Houston Division where it was assigned to Judge Hittner.[12]

As in Delgado, defendants in *Jorge Carcamo* joined in Dead Sea's removal, asserted additional bases of federal subject matter jurisdiction, and filed cross-claims, and Shell filed supplemental notices of removal. Plaintiffs' motions for remand raised two procedural arguments not

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[10] Defendants are thus the same group listed in *Delgado*, with the exception of Del Monte Fresh Produce, N.A., and Del Monte Tropical Fruit Co.

[11] Plaintiffs' Seventh Amended Petition, *Jorge Carcamo v. Shell Oil Co.*, No. 93-C-2290 (23rd Dist. Ct. Brazoria County, Texas), attached as Exhibit 2(A) to Dead Sea's Notice of Removal, Docket Entry No. 1 in H-94-1359, at 4, ¶ 12.

[12] Docket Entry No. 20 in H-94-1359.

implicated in *Delgado*. Plaintiffs argued that Dead Sea's removal of *Jorge Carcamo* was procedurally defective because Dead Sea was never properly joined as a third-party defendant in state court due to Dow Chemical's failure to obtain leave to implead it. Alternatively, plaintiffs argued that the court lacks jurisdiction because plaintiffs' Seventh Amended Petition (expressly renouncing any intention to pursue claims against Dead Sea or its affiliated companies) rendered Dead Sea's joinder fraudulent.

Unlike *Delgado* the complexity of issues in *Jorge Carcamo* continued to grow as new parties were added. On June 10, 1994, Magistrate Judge Crone granted Dow Chemical's motion for leave to serve an amended third-party complaint impleading not only Dead Sea, Ameribrom, and the Del Monte entities, but also AMVAC Chemical Corp., Saint Lucia Banana Growers Association, Saint Vincent Banana Growers Association, Dominica Banana Growers Association, and Programa Nacional de Banano, as additional third-party defendants.[13] On June 21, 1994, third-party defendant Del Monte Fresh Produce, N.A., filed a fourth-party complaint impleading Bromine Compounds Ltd., a wholly owned subsidiary of Dead Sea.

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[13] (Docket Entry Nos. 33 & 34 in H-94-1359). Dow filed its motion on May 6, 1994 (Docket Entry No. 73 in H-94-1359), and Judge Hittner referred the motion to Judge Crone on May 16, 1994. (Docket Entry No. 38 in H-94-1359) Plaintiffs' motion for reconsideration of Judge Crone's decision (Docket Entry No. 93 in H-94-1359) was denied by the undersigned judge on November 18, 1994. (Docket Entry No. 191 in H-94-1337).

Although *Jorge Carcamo* stood in this posture on June 30, 1994, when the court granted Shell's unopposed motion to consolidate *Delgado* with *Jorge Carcamo,*[14] the entry and exit of parties continued. On November 18, 1994, the court dismissed third-party defendants Dominica Banana Growers Association, Saint Lucia Banana Growers Association, and Saint Vincent Banana Growers Association after defendants conceded they could not present facts justifying continued opposition to dismissal.[15] On March 21, 1995, the court granted the motion of Miguel A. Lazo Amaya, and other domiciliaries of Honduras, to join the action as a second group of intervenor-plaintiffs in *Jorge Carcamo.*[16] Finally, on May 24, 1995, the court dismissed third-party defendant Programa Nacional de Banano for lack of personal jurisdiction.[17]

3. *Rodriguez v. Shell Oil Co.*, H-94-3248

Plaintiffs in this action are citizens of Honduras and, with the exception of one Texas resident and one Michigan resident, are residents of Honduras. Defendants are the same as those in *Jorge Carcamo.* On April 6, 1994, Shell and the Chiquita entities filed third-party petitions against Dead Sea and Ameribrom. On April 7, 1994,

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[14] *M & O I,* Docket Entry No. 86 in H-94-1337; Docket Entry No. 102 in H-94-1359, at 15.

[15] Docket Entry Nos. 182, 183, & 184 in H-94-1337, respectively.

[16] Docket Entry No. 236 [granting Docket Entry No. 216] in H-94-1337.

[17] Docket Entry No. 260 in H-94-1337.

before the 229th District Court of Jim Hogg County, Texas, had granted leave to serve the third-party petitions, Dead Sea removed the case to the Laredo Division of this district where it was assigned to Judge Kazen as Civil Action No. L-94-49. Defendants joined in the removal, articulated additional bases for federal subject matter jurisdiction, and filed cross-claims against Dead Sea, and Shell filed supplemental notices of removal. Plaintiffs moved to remand for the same reasons articulated in *Delgado* and *Jorge Carcamo*. On September 23, 1994, Judge Kazen granted Shell's motion to transfer the case to the Houston Division[18] where it was assigned to the undersigned judge. On December 20, 1994, the court entered an order consolidating the case with *Delgado*, *Jorge Carcamo*, and the next case in the litany, *Erazo*.[19]

4. *Erazo v. Shell Oil Co.*, H-94-3451

On August 24, 1993, Manuel Antonio Balderamos Erazo, a citizen of Honduras, commenced a DBCP action against Shell in the 206th District Court of Hidalgo County, Texas. Shell's initial attempt to remove the action to the McAllen Division of this district met the same fate as the counterpart initial removal in *Delgado*.[20] On April 6, 1994, Shell filed a third-party petition against Dow Chemical Co., Occidental Chemical Corp., Dead Sea,

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[18] Docket Entry No. 66 in H-94-3248.

[19] Docket Entry No. 91 in H-94-3248.

[20] Order of Remand, *Erazo v. Shell Oil Co.*, No. M-93-208 (S.D.Tex. Jan. 5, 1994) (Hinojosa, J.), attached as Exhibit 3(G) to Dead Sea's Notice of Removal, Docket Entry No. 1 in H-94-3451.

Ameribrom Inc., and AMVAC Chemical Corp. Before the state court had granted leave to serve the third-party petition, Dead Sea removed the case to the McAllen Division where it was again assigned to Judge Hinojosa as Civil Action No. M-94-055. Defendants joined in the removal, articulated additional bases for federal subject matter jurisdiction, and filed cross-claims against Dead Sea, and Shell filed supplemental notices of removal. Plaintiffs moved to remand for the same reasons articulated in *Delgado* and *Jorge Carcamo*. On September 29, 1994, Judge Hinojosa granted Shell's motion to transfer the case to the Houston Division[21] where it was assigned to the undersigned judge. The court's December 20, 1994, Order consolidated this case with *Delgado, Jorge Carcamo,* and *Rodriguez*.[22]

5. *Valdez v. Shell Oil Co.*, H-95-1356 & *Isae Carcamo v. Shell Oil Co.*, H-95-1407

Plaintiffs in *Valdez* are citizens of Burkina Faso, Dominica, Ecuador, Honduras,[23] Ivory Coast, the Philippines, Saint Lucia, and Saint Vincent. Defendants are the same as those in *Jorge Carcamo*. On April 5, 1994, Dow Chemical Co. filed a third-party petition against the Del Monte entities, Dead Sea, and Ameribrom. On April 6, 1994, before the 276th District Court of Morris County,

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[21] Docket Entry No. 57 in H-94-3451.

[22] Docket Entry No. 70 in H-94-3451.

[23] At least two of the plaintiffs allegedly injured in Honduras, Juan Ramon Valdez and Genaro de Jesus Valdez Turcios, are residents of Texas.

Texas, had granted leave to serve the third-party petitions, Dead Sea removed the case to the Marshall Division of the Eastern District of Texas, where it was assigned to Judge Steger as Civil Action No. 2-94CV-69. Defendants joined in the removal, articulated additional bases for federal subject matter jurisdiction, and filed cross-claims against Dead Sea, and Shell filed supplemental notices of removal. Plaintiffs moved to remand for the same reasons articulated in *Delgado* and *Jorge Carcamo*.

On April 25, 1994, Shell moved to consolidate *Valdez* with *Isae Carcamo*, another DBCP case that had been removed to the Marshall Division of the Eastern District.[24] On June 3, 1994, Judge Steger referred all pretrial

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[24] Docket Entry No. 10 in H-95-1356. *Isae Carcamo*, an action commenced by an individual Honduran plaintiff in the 276th District Court of Morris County, Texas, on July 12, 1993, is procedurally most similar to *Delgado*. The original petition named only one defendant, Shell. Shell removed, asserting FIFRA preemption, and Judge Hall remanded for the same reasons articulated in *Delgado* and *Rodriguez*. (Order entered September 17, 1993, in *Isae Carcamo*, No. 2-93CV-0134, attached as Exhibit 4(O) to Dead Sea's Notice of Removal, Docket Entry No. 1 in H-95-1407). Plaintiff then amended his petition to add Dow, Occidental, the Dole entities, and the Standard Fruit entities. Dead Sea removed the action shortly after Dow filed a single pleading containing both its original answer and a third-party petition against Del Monte, Dead Sea, and Ameribrom on April 6, 1994. Once in federal court the action became Civil Action No. 2-94CV-73 and was assigned to Judge Hannah. Defendants joined in the removal, articulated additional bases for federal subject matter jurisdiction, and filed cross-claims against Dead Sea, and Shell filed supplemental notices of removal. Plaintiff moved to remand for the same reasons articulated in *Delgado*. On June 22, 1994, Judge Hannah ordered that *Isae Carcamo* be consolidated with *Valdez*. (Docket Entry No.

motions to Magistrate Judge Radford.[25] On March 23, 1995, Judge Radford granted Dow's motion for leave to serve an amended third-party complaint impleading Dead Sea, Ameribrom, the Del Monte entities, AMVAC Chemical Corp., Saint Lucia Banana Growers Association, Saint Vincent Banana Growers Association, Dominica Banana Growers Association, and Programa Nacional de Banano, as third-party defendants in *Valdez*.[26] In light of that ruling and Dead Sea's waiver of sovereign immunity[27] Judge Radford found that federal subject matter jurisdiction existed over both *Valdez* and *Isae Carcamo*, and he denied plaintiffs' motions to remand in both cases.[28] Judge Radford also denied Shell's motion to transfer venue to the Houston Division of the Southern District.[29] After considering defendants' objections to Judge Radford's denial of Shell's motion to transfer venue, Judge Steger vacated the order, granted Shell's motion, and transferred the action to this court on April 26, 1995,[30] where it was assigned to Judge Werlein. On

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45 in H-95-1407; Docket Entry No. 73 in H-95-1356) On April 26, 1995, Judge Steger ordered the case transferred to this district (Docket Entry No. 49 in H-95-1407), where it was assigned to Judge Rosenthal and then consolidated with H-94-1337. (Notwithstanding their earlier consolidation in the Eastern District of Texas, *Isae Carcamo* and *Valdez* were separately transferred to this district.)

[25] Docket Entry No. 59 in H-95-1356.

[26] Docket Entry No. 138 in H-95-1356.

[27] Docket Entry No. 125 in H-95-1356.

[28] Docket Entry No. 137 in H-95-1356.

[29] Docket Entry No. 136 in H-95-1356.

[30] Docket Entry No. 147 in H-95-1356.

May 17, 1995, the undersigned judge entered an order consolidating *Valdez* (and *Isae Carcamo*) with *Delgado, Jorge Carcamo, Rodriguez,* and *Erazo.*[31]

B. Common Contentions and Uncommon Questions

The decision to consolidate these cases was premised on the prevalence of common parties and issues. Notwithstanding the number of common issues in the cases, there are some issues that are shared by fewer than all of the cases and some issues that are unique to each case. As the court explained during the December 16, 1994, scheduling conference, the consolidation of these cases does not result in complete unification. Each case retains its distinct substantive and procedural character.[32] The list of issues is therefore lengthy. The nuances distinguishing the manner in which an issue is implicated (and the reasons a particular issue is not implicated) in each case are also subtle and complex. The following prologue to the court's discussion merely categorizes the bulk of the issues and establishes the order in which the court will address them.

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[31] Docket Entry No. 254 in H-94-1337.

[32] *McKenzie v. United States,* 678 F.2d 571, 574 (5th Cir.1982) ("[C]onsolidation does not cause one civil action to emerge from two; the actions do not lose their separate identity; the parties to one action do not become parties to the other."); *Kuehne & Nagel (AG & Co.) v. Geosource, Inc.,* 874 F.2d 283, 287 (5th Cir.1989) ("[W]e must view each consolidated case separately to determine the jurisdictional premise upon which each stands.").

1. Issues concerning the propriety of removal

Plaintiffs argue that all of the cases must be remanded to state court pursuant to 28 U.S.C. § 1447(c) either because this court lacks subject matter jurisdiction or because the removals were procedurally defective. As detailed above, each case was removed to federal court by Dead Sea and Shell. In *M & O I* the court held that Dead Sea was capable of properly removing *Delgado* to this court because it was a foreign sovereign.[33] Since then Dead Sea has expressly waived the defenses of sovereign immunity and lack of in personam jurisdiction for purposes of these cases only.[34] Notwithstanding these developments plaintiffs argue that Dead Sea was incapable of removing any of the cases, including *Delgado*, because Dead Sea had been fraudulently joined. Plaintiffs also argue that Dead Sea was incapable of properly removing *Jorge Carcamo, Rodriguez, Erazo,* and *Valdez* because when Dead Sea removed those cases it had not yet been joined

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[33] In papers filed on June 29, 1995, plaintiffs argue that FSIA jurisdiction no longer exists because as of February or June of 1995 Israel no longer owned a majority of the shares of Dead Sea. The court is not persuaded by this argument. Since Israel owned a majority of the shares of Dead Sea when plaintiffs were allegedly exposed to DBCP manufactured by Dead Sea, FSIA jurisdiction exists notwithstanding subsequent changes in ownership. *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 449-450 (6th Cir.1988); *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376, 1380-82 (8th Cir.1993).

[34] As noted earlier, Dead Sea's waiver of sovereign immunity in *Valdez* and *Isae Carcamo* appears as Docket Entry No. 125 in H-95-1356. A similar waiver relating to the remaining cases appears as Docket Entry No. 218 in H-94-1337.

as a party. These arguments require the court to determine whether Dead Sea properly removed the cases. If Dead Sea's removal was improper in any of the cases the court must also determine whether Shell's supplemental removal was proper.

2. Issues concerning dismissal of parties and actions

Plaintiffs alternatively argue that even if Dead Sea was not improperly joined, it and its affiliated companies should be dismissed from these cases because under Texas law defendants cannot state a meritorious claim for contribution or indemnity against Dead Sea or any of its affiliates. Once Dead Sea's dismissal is accomplished, plaintiffs urge the court to remand the cases to state court by declining to exercise supplemental jurisdiction over the underlying suits between plaintiffs and defendants. Defendants counter that before determining whether Dead Sea should be dismissed the court must determine whether the defendants' contribution and indemnity claims will be governed by Texas law or some other law. Defendants argue that the law governing the underlying suits between the plaintiffs and the defendants should also provide the rule of decision concerning the contribution and indemnity claims. Defendants argue that they have valid and extant claims for contribution and indemnity against Dead Sea under the laws of a number of the plaintiffs' home countries. Finally, defendants argue that, after resolving all of the issues concerning removal, the court should apply the doctrine of forum non conveniens and dismiss all of the cases.

III. Removal and Remand

A. Standard of Review

"Section 1447(c) provides two grounds for remand: (1) a defect in removal procedure and (2) lack of subject matter jurisdiction." *Burks v. Amerada Hess Corp.*, 8 F.3d 301, 303 (5th Cir.1993). When considering a motion to remand the removing party bears the burden of showing that removal was proper. *Willy v. Coastal Corp.*, 855 F.2d 1160, 1164 (5th Cir.1988), appeal after remand, 915 F.2d 965 (5th Cir.1990), aff'd, 503 U.S. 131, 112 S.Ct. 1076, 117 L.Ed.2d 280 (1992). "This extends not only to demonstrating a jurisdictional basis for removal, but also necessary compliance with the requirements of the removal statute." *Albonetti v. GAF Corporation-Chemical Group*, 520 F.Supp. 825, 827 (S.D.Tex.1981). Because removal jurisdiction "raises significant federalism concerns," *Willy*, 855 F.2d at 1164, courts must construe removal statutes "narrowly, with doubts resolved in favor of remand to the state court." *Jefferson Parish Hosp. Dist. No. 2 v. Harvey*, 788 F.Supp. 282, 283-84 (E.D.La.1992). If there is any doubt that a right to removal exists, "ambiguities are to be construed against removal." *Samuel v. Langham*, 780 F.Supp. 424, 427 (N.D.Tex.1992).

Notwithstanding its duty to interpret removal statutes narrowly, a "District Court exceed[s] its authority in remanding on grounds not permitted by the controlling statute." *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 345, 96 S.Ct. 584, 590, 46 L.Ed.2d 542 (1976). The Fifth Circuit has recently clarified the permissible grounds for remand:

> Generally, the remand of a case that has been removed to federal court is governed by statutory provisions found at 28 U.S.C. §§ 1441(c) and 1447(c).
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> . . . .
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> Under these two sections, the district court has general authority to remand a case under any of the following circumstances: 1) it has discretion to remand state law claims that were removed along with one or more federal question claims; 2) it must act on a timely motion to remand based on a defect in removal procedure; and 3) it must remand a case over which it has no subject matter jurisdiction. No other authority to remand a case is established by statute, but . . . one additional jurisprudential authority for discretionary remand does exist.

Buchner v. FDIC, 981 F.2d 816, 819 (5th Cir.1993). "[A] district court has discretion to remand to state court a removed case involving [only] pendent claims upon a proper determination that retaining jurisdiction over the case would be inappropriate." *Carnegie-Mellon University v. Cohill*, 484 U.S. 343, 357, 108 S.Ct. 614, 623, 98 L.Ed.2d 720 (1988).

B. Removal by Dead Sea

1. Fraudulent joinder

Plaintiffs argue that the court should ignore the fact that Dead Sea's presence in these lawsuits confers federal jurisdiction upon the actions because Dead Sea was "fraudulently joined." The question of fraudulent joinder typically arises when a diverse defendant removes an

action on the basis of diversity jurisdiction despite the presence of one or more non-diverse defendants. The removing party will often attempt to convince the court to ignore the in-state defendant by arguing that it was fraudulently joined. "[T]o establish that an in-state defendant has been fraudulently joined, the removing party must show either that there is no possibility that the plaintiff would be able to establish a cause of action against the in-state defendant in state court; or that there has been outright fraud in the plaintiff's pleadings of jurisdictional facts." *B. Inc. v. Miller Brewing Co.*, 663 F.2d 545, 549 (5th Cir.1981).

The question of fraudulent joinder to defeat the right to remove an action to federal court is not implicated in these cases. The cases present the different issue of whether the removing defendants improperly attempted to create a right to remove them by collusively joining a third-party defendant. The cases thus raise the analytically distinct question whether the court lacks jurisdiction pursuant to 28 U.S.C. § 1359, which provides that "[a] district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

> Section 1359 is designed to prevent the litigation of claims in federal court by suitors who by sham, pretense, or other fiction acquire a spurious status that would allow them to invoke the limited jurisdiction of the federal courts. The purpose of the statute is to prevent the manipulation of jurisdictional facts where none existed before. . . .

Nolan v. Boeing Co., 919 F.2d 1058, 1067 (5th Cir.1990), cert. denied, 499 U.S. 962, 111 S.Ct. 1587, 113 L.Ed.2d 651 (1991). *See* also 14 Wright, Miller & Cooper, Federal Practice & Procedure, § 3637 at 90-94 (1985). In *Harvey Construction Co. v. Robertson-Ceco Corp.*, 10 F.3d 300 (5th Cir.1994), the court differentiated between the collusive manipulation of jurisdictional facts and the collusive manipulation of facts that merely affect the outcome of the case.

> Although we note, without so finding, that there may be some truth to the allegations of collusion, we cannot sustain the jurisdictional dismissal of the indemnity claim. Whether the settlement [between the original plaintiff and the current plaintiff seeking indemnity] was collusive or not goes only to the merits of the action and does not affect the jurisdiction of the district court. We hold that the district court erred in dismissing *Harvey's* indemnity claim for want of subject matter jurisdiction.
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> . . . .
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> On remand, if the district court determines that diversity exists between [the original plaintiff] and [the current defendant], it must find that the assignment of [the original plaintiff's] claims . . . did not create collusive jurisdiction. . . .

Id. at 303-04 (emphasis in the original).

Plaintiffs do not suggest that Dead Sea's status as a foreign sovereign was collusively manufactured to establish federal jurisdiction. Nor do they argue that defendants could never have stated a claim for contribution or

indemnity against Dead Sea.[35] Instead, plaintiffs argue that their pleadings, filed either immediately before or soon after removal, disclaiming any further intention of seeking recovery for damages caused by exposure to product manufactured, marketed, or sold by Dead Sea, together with post-removal settlement agreements between plaintiffs and Dead Sea, establish that Dead Sea was collusively joined. The court is not persuaded by plaintiffs' arguments because they relate to the merits of the third-party actions; they do not undermine any jurisdictional facts providing Dead Sea a right to remove these cases under 28 U.S.C. § 1441(d). Accordingly, the court concludes that § 1359 is not an impediment to jurisdiction in any of the consolidated cases.

2. Prematurity

Plaintiffs argue that Dead Sea improperly removed *Jorge Carcamo, Rodriguez, Erazo,* and *Valdez* because the state courts never authorized the impleading defendants to serve third-party petitions on Dead Sea. According to plaintiffs, this means that Dead Sea's removal was defective because Dead Sea was not yet a "defendant" in the cases when it removed them. Although the question is not entirely free from doubt and a rule of general

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[35] Although plaintiffs argue that defendants have failed to show that any Israeli DBCP was used in some countries, and that the evidence of the use of Israeli DBCP in other countries is weak, there is evidence of the use of Israeli DBCP in at least one of the plaintiffs' home countries implicated by plaintiffs' pleadings in each of these six consolidated cases.

applicability is not easily stated, a review of precedent convinces the court that plaintiffs' position is correct.

a. What law governs?

"The right to remove a case from state to federal court derives solely from the statutory grant of jurisdiction in 28 U.S.C. § 1441. . . . " *Willy v. Coastal Corp.*, 855 F.2d at 1164. Because "[t]he legislature or the judiciary of a state can neither defeat the right given by a constitutional act of congress to remove a case from a court of the state into . . . [a] court of the United States nor limit the effect of such removal," *Goldey v. Morning News of New Haven*, 156 U.S. 518, 523, 15 S.Ct. 559, 561, 39 L.Ed. 517 (1895), federal law governs the decision whether Dead Sea had a mature right to remove these actions.

b. When does a defendant's right to remove mature?

28 U.S.C. § 1441(d) affords a foreign sovereign the right to remove "[a]ny civil action brought in a State court against [it]. . . . " Professor Moore interprets the identical language in the general removal provision, § 1441(a), to mean that "a civil action, to be removable, must have been 'brought' in a state court, i.e., some proceeding . . . must be pending before removal is in order; and until that time the petition for removal is premature." 1A James W. Moore, Moore's Federal Practice (Moore's), ¶ 0.157 [4. – 10] (footnote omitted). *See Goldey v. Morning News of New Haven*, 156 U.S. at 525, 15

S.Ct. at 562 ("[T]he suit must be actually pending in the state court before it can be removed. . . . ").

Whether a case has been "brought" or is "pending" is not always easy to determine. "If an action is commenced in a state court in accordance with its usual and normal procedure, then, of course, the action may be properly regarded as 'brought' for removal purposes. But . . . something less than regular commencement will [sometimes] suffice." 1A Moore's, ¶ 0.157[4. – 10] (footnote omitted). Professor Moore synthesizes the body of precedent examining when an original defendant's right to remove matures as establishing that a person not yet technically a defendant under state law can nevertheless remove the action provided that "the state's judicial machinery is set in motion against the defendant." 1A Moore's, ¶ 0.157[4. – 10] (footnote omitted). Thus, one impressed with a successful ex parte application for a temporary restraining order has a mature right to remove even before process is issued on the underlying action for an injunction.[36] The Fifth Circuit has applied the same rule to successful ex parte writ of attachment proceedings[37] and, recently, to a situation that had not yet ripened into formal state contempt proceedings where there

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[36] *See*, e.g., *English v. Supreme Conclave, Improved Order of Heptasophs*, 235 F. 630, 631-32 (D.N.J.1916) ("Whatever the form of the proceeding to bring a defendant into court, a suit is brought when such defendant is subjected to judicial orders. . . . [T]he filing of an injunction bill in a state court, followed by an ad interim stay, pending the hearing of a rule to show cause why a preliminary injunction should not issue in said cause, is a suit within the meaning of the Federal Statute in question.").

[37] *Dulion v. S.A. Lynch Enterprise Finance Corp.*, 53 F.2d 568, 569 (5th Cir.1931), cert. denied, 285 U.S. 540, 52 S.Ct. 312, 76

would be "no meaningful delay between a party or witness' refusal to comply with a subpoena and the state court's right to hold the party or witness in contempt."[38]

In *FDIC v. Loyd*, 955 F.2d 316 (5th Cir.1992), the Fifth Circuit held that the district court erred in sua sponte remanding a case 21 months after it had been removed on the ground that the removal was procedurally defective because it was not timely filed under 28 U.S.C. § 1446(b). One of the questions before the Fifth Circuit was "[w]hen did the case first become removable by the FDIC?" *Id.* at 326. The court resolved this question by stating that

> [b]ecause only the presence of the FDIC in the case provides federal jurisdiction, it would certainly appear that the FDIC first had to be a party before the case was removable to federal court. . . . [W]e hold that the FDIC cannot be considered a party for the purposes of § 1446(b) until it has made an appearance, voluntary or involuntary, in the state court case.

Id. at 326-27. The court also provided guidance concerning similar situations not involving the FDIC by stating that

> [c]ommon sense and the practicalities of pleading dictate that no non-party to a state court proceeding has a mature right to remove that

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L.Ed. 933 (1932) ("Though no declaration had been filed when the removal was applied for . . . the suit, shown by the attachment affidavit to be on a demand for money, was removable. . . . In such a case as the instant one the levy of attachment is the commencement of the suit." (citations omitted)).

[38] *Louisiana v. Sparks*, 978 F.2d 226, 232 (5th Cir.1992).

> proceeding to federal court. . . . We cannot imagine that a private person who was not a party to the state court action could nevertheless remove the case to federal court. There is nothing to suggest such an indiscriminate right.

Id. In a later footnote the court added that "it should be clear, as a general principle, that the right to remove a case does not mature, or even come into being, until one claiming the right has become a party to that case." *Id.* at 327 n. 12.

c. Did Dead Sea have a mature right to remove?

Plaintiffs argue that when Tex.R.Civ.P. 38 requires leave of court to serve a third-party petition, the putative third-party defendant's removal right cannot mature until leave is granted because, absent leave of court, a third-party defendant cannot be subjected to the judicial machinery of the state.[39] In *FDIC v. Klayer*, 519 F.Supp. 889, 891 (E.D.Ky.1981), the court adopted a similar argument in granting a motion to remand.

> The Counterclaim-Cross Claim [a pleading stating a counterclaim against FDIC and commencing a third-party action against a federal official] was not pending in the state court. . . . At the time the petition for removal was

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[39] *See*, e.g., *Bilek & Purcell v. Paderwerk Gebr. Benteler GmbH & Co.*, 694 S.W.2d 225, 227 (Tex.App. – Houston [1st Dist.] 1985, no writ) (reversing default judgment against third-party defendant where record failed to demonstrate that required leave of court to implead was obtained).

filed, the FDIC was resisting the filing of the Counter-claim-Cross Claim in the state court, and there is no assurance that the state court would have permitted it to be filed and process to issue thereon.

It is undisputed that Dead Sea does not meet the test established in *Loyd:* Until the state court granted a third-party plaintiffs' motion for leave to implead Dead Sea it had no right to appear voluntarily and it could not have been forced to appear involuntarily as a third-party defendant.[40] Relying on *Rodriguez v. Transnave, Inc.*, 8 F.3d 284 (5th Cir.1993), defendants argue that Dead Sea should nevertheless be allowed to remove these cases within 30 days after it received a courtesy copy of a pleading naming it as a third-party defendant because a third-party foreign sovereign should not have to take the risk that it may lose the right to remove if the state court fails to rule on the motion seeking leave to implead within that time. Although *Transnave, Inc.* does not involve improper removal[41] defendants' argument merits discussion.

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[40] Unlike the FDIC, a foreign sovereign cannot obtain the right to remove pursuant to § 1441(d) through intervention. *J. Baxter Brinkman Oil & Gas Corp. v. Thomas*, 682 F.Supp. 898, 900 (N.D.Tex.1988).

[41] In *Transnave, Inc.*, plaintiff incorrectly named a domestic corporation, Transnave, Inc., instead of Transportes Navieros Ecuatorianos, a foreign sovereign, as the defendant. Nevertheless, the foreign sovereign removed the action after receiving a courtesy copy of the state court petition. The Fifth Circuit held that the foreign sovereign did not waive its immunity defense by voluntarily removing the case from state to federal court before plaintiff had corrected the error or by participating in discovery and other pretrial matters once in federal court. *Id.* at 288-90. Because subject matter jurisdiction

Defendants' argument rests on the rule that the time for removal ordinarily begins upon receipt, "through service or otherwise" of the pleading first evidencing removability.[42] According to defendants, this rule means that a third-party defendant may lose the right to remove

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existed over the dispute concerning the foreign sovereign's immunity defense, *see* 28 U.S.C. §§ 1330, 1602, plaintiff in *Transnave* had 30 days in which to move for remand or waive all non-jurisdictional removal defects, including the question whether the foreign sovereign had a mature right to remove before being properly substituted for the incorrectly named defendant. *In re Shell Oil Co.*, 932 F.2d 1518, 1523 (5th Cir.1991), cert. denied sub nom. *Castillo v. Shell Oil Co.*, 502 U.S. 1049, 112 S.Ct. 914, 116 L.Ed.2d 814 (1992) (objections to procedural defects in removal not voiced within the 30-day time period provided by 28 U.S.C. § 1447(c) are waived). Although neither the Fifth Circuit nor the district court, *Rodriguez v. Transnave, Inc.*, 810 F.Supp. 194 (S.D.Tex.), rev'd, 8 F.3d 284 (5th Cir.1993), refer to the issue of waiver, the docket sheet in *Rodriguez v. Transnave, Inc.*, No. H-90-3445 (S.D.Tex.), indicates that plaintiff never filed a motion to remand. Because plaintiff failed to move for remand neither court could address any procedural defects. *Loyd*, 955 F.2d at 322 ("[W]e interpret the first sentence of § 1447(c) as precluding all remands for procedural defects after the expiration of the thirty-day remand period. . . . "); *In re Allstate Ins. Co.*, 8 F.3d 219, 223 (5th Cir.1993) ("[W]e can discern no basis . . . for conferring upon the district courts discretion sua sponte to remand for purely procedural defects . . . " even if the court acts within the thirty-day remand period.). The holding of *Transnave, Inc.* thus sheds no light upon Dead Sea's right to remove.

[42] 28 U.S.C. § 1446(b); *Chapman v. Powermatic, Inc.*, 969 F.2d 160, 161 (5th Cir.1992), cert. denied, 507 U.S. 967, 113 S.Ct. 1402, 122 L.Ed.2d 774 (1993) ("[I]f the case stated by the initial pleading is removable, then notice of removal must be filed within thirty days from the receipt of the initial pleading by the defendant.").

unless the state court rules on the motion for leave to implead within 30 days after the third-party defendant receives a copy of the third-party petition. To avoid that possibility defendants argue that Dead Sea was entitled to remove when it received a copy of the third-party petition against it without waiting for the state court to act.

This potential inability to remove is not unique, however. For a number of reasons the time for removal may be triggered and expire before a particular defendant has an opportunity to remove the case. For example, in cases involving multiple defendants the time for removal begins when the first defendant's removal right matures. If the first defendant to be served fails to remove timely, later-served defendants may lose the right to remove. *Brown v. Demco, Inc.*, 792 F.2d 478, 481-82 (5th Cir.1986). It would therefore not necessarily be unjust to hold that a foreign sovereign, third-party defendant can similarly lose the right to remove if it fails to correctly determine when the right to remove matures. Furthermore, Congress foresaw that time delays inherent in instituting actions against foreign entities might hinder prompt action by foreign sovereign defendants. Thus, "[w]here removal is based upon [§ 1441(d)] the time limitations of section 1446(b) . . . may be enlarged at any time for cause shown." 28 U.S.C. § 1441(d).

In Texas, where leave of court to serve a third-party petition is sometimes required, a foreign sovereign that receives no more than a courtesy copy of a third-party petition might not know whether the removal clock had begun ticking. The remover bears the burden of proving that removal was proper, however, and this burden

includes the task of determining, upon receipt of a variety of papers, whether the right to remove has ripened. Cf. § 1446(b) (placing burden to discover whether a case is removable upon the defendant by providing that the removal clock can be triggered by "service of summons . . . if such initial pleading has then been filed in court and is not required to be served on defendant. . . . ").

In *Jorge Carcamo, Rodriguez, Erazo,* and *Valdez* inquiries by Dead Sea would have revealed that it could not be subjected to the judicial machinery of the state (and therefore that Dead Sea could safely ignore the third-party petitions) until a state court granted leave to implead Dead Sea. Dead Sea's removal right would not mature (and the removal clock would not begin) until Dead Sea received a paper, through service or otherwise, indicating that the court had granted leave to serve a third-party petition on Dead Sea. Because Dead Sea did not have a mature right to remove *Jorge Carcamo, Rodriguez, Erazo,* or *Valdez* when it removed them, the court concludes that Dead Sea's removal of these cases was premature.

C. Removal by Shell

The conclusion that Dead Sea prematurely removed *Jorge Carcamo, Rodriguez, Erazo,* and *Valdez* is not dispositive of the overall question whether the cases were properly removed because in each case *Shell* filed supplemental removal notices. Although it is undisputed that *Shell*'s removal notices were filed more than 30 days

after the first defendant received plaintiffs' initial pleadings in each case, *Shell* advances three arguments why its supplemental removal notices were proper. In general,

> [t]here are two different contexts in which delayed removal is permissible. In one, the plaintiff, after commencing suit in state court, takes some action that makes a previously unremovable case removable. In the other, the initial pleading is incomplete in a way that conceals its removability, but the process of litigation reveals its removability.

Gruner v. Blakeman, 517 F.Supp. 357, 361 (D.Conn.1981). Shell's arguments implicate both of these contexts.

1. Medical monitoring

Shell first argues that these cases were properly removed because plaintiffs' Sixth Amended Petitions in *Jorge Carcamo* and *Delgado* and plaintiffs' Fifth Amended Petition in *Rodriguez* added claims relating to medical monitoring costs which, for the first time, sufficiently implicated the federal common law of foreign relations to confer federal question jurisdiction on the entire action. For this proposition defendants principally rely on *Sequihua v. Texaco, Inc.*, 847 F.Supp. 61 (S.D.Tex.1994). Plaintiffs in *Sequihua* prayed for the creation of a trust fund and for court supervision of "a medical monitoring scheme of unknown cost, scope or duration for as many as 500,000 Ecuadoran [sic] citizens over the protest of the government of Ecuador." *Id.* at 63. Plaintiffs in the instant cases, on the other hand, simply pray for "judgment

against Defendants, and each of them, jointly and severally, for general and special damages . . . " including the costs of "medical testing, evaluation, examination, and other related expenses."[43] Regardless of whether the substantive law ultimately applied to plaintiffs' claims will afford such a remedy, amendments that accomplish nothing more than the addition of a prayer for the recovery of a sum of money to compensate for this type of damages do not change the nature of plaintiffs' claims to give rise to a newly discoverable federal question. Accordingly, even if the court were to conclude, as defendants have consistently argued, that plaintiffs' petitions include claims arising under the federal common law of foreign relations there is nothing sufficiently different about these amended pleadings to warrant the commencement of a new removal period. The court concludes that Shell's removal, insofar as it is predicated on the existence of plaintiffs' claims for medical monitoring, was fatally defective because the amendments do not present a newly removable federal question.

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[43] Plaintiffs' Sixth Amended Petition in *Jorge Carcamo*, attached as Exhibit A to Shell Oil Co.'s Notice of Joinder in Removal and Supplemental Notice of Removal, Docket Entry No. 5 in H-94-1359, at 17, ¶¶ 48(c) & ad damnum; Plaintiffs' Sixth Amended Petition in Delgado, attached as Exhibit A to Shell Oil Co.'s Notice of Joinder in Removal and Supplemental Notice of Removal, Docket Entry No. 9 in H-94-1337, at 15-16, ¶¶ 41(d) & ad damnum; Plaintiffs' Fifth Amended Petition in *Rodriguez*, attached as Exhibit B to Shell Oil Co.'s Notice of Joinder in Removal and Supplemental Notice of Removal, Docket Entry No. 9 in H-94-1337, at 14-15, ¶¶ 39(d) & ad damnum.

2. Treaty rights

Shell also argues that plaintiffs' response to Dow's Motion to Dismiss for Lack of Subject Matter Jurisdiction in another DBCP case, *Borja v. Shell Oil Co.*, No. 93-320-F (116th District Court of Dallas County, Texas), was the first "litigational" paper that clarified plaintiffs' case in a way that allowed Shell to determine that all of these cases raised removable federal questions. Although admitting that early versions of plaintiffs' petitions in each case stated causes of action under Tex.Civ.Prac. & Rem.Code Ann. § 71.031 and that a plaintiff cannot avail himself of § 71.031 without showing that his home country has "equal treaty rights" with the United States, Shell argues that plaintiffs' response to Dow's Motion to Dismiss in Borja first identified the existence of federal questions relating to "the existence, interpretation, effect, and/or validity of treaties between the United States and [numerous] nations . . . as well as the alleged applicability of certain multilateral agreements."[44] Shell argues that all of these cases therefore fall squarely into the second category of cases allowing delayed removal. Shell's argument is not new. A nearly identical argument was advanced and rejected in *Lozano v. GPE Controls*, 859 F.Supp. 1036 (S.D.Tex.1994), and in *Deaker v. Bell Helicopter Textron, Inc.*, No. H-94-2387 (S.D.Tex. Sept. 21, 1994). Once again the court is not persuaded by this argument.

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[44] Shell Oil Co.'s Notice of Joinder in Removal and Supplemental Notice of Removal, Docket Entry No. 9 in H-94-1337, at 2, ¶ 3.

For purposes of the pending motion to remand only, the court assumes without deciding that prosecution of state law claims by citizens of foreign countries pursuant to § 71.031 presents a federal question. *See Kern v. Jeppesen Sanderson, Inc.*, 867 F.Supp. 525, 531 (S.D.Tex.1994) ("If no treaty exists or if Plaintiffs contend they are not relying on a treaty, they lack standing to sue. If there is a treaty, its construction permits removal based on federal question jurisdiction."). The *Lozano* court held that where "defendants were clearly aware of the foreign citizenship of the plaintiffs and the foreign situs of the explosion on which th[e] action is based when they were initially served with the complaint in 1988 . . . defendants had sufficient knowledge of the applicability of the Texas treaty statute to plaintiffs' claims to assert the Texas treaty statute as a[ ] basis for removal . . . in 1988." 859 F.Supp. at 1038. The court held that removal in July of 1994 was untimely. Similarly, in *Deaker*, the court explained that receipt on May 26, 1994, of plaintiff's admission that he had never been a citizen of the United States sufficiently clarified plaintiff's status as either a citizen of a foreign country or a stateless person to place defendants on notice that the action had become as removable as it would ever be.[45] Accordingly, the court held that removal effected on July 13, 1994, was untimely.

Defendants cannot dispute that early versions of plaintiffs' petitions clearly identified that most of the plaintiffs claimed foreign citizenship and that all of their alleged injuries arose abroad. Neither can defendants

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[45] *Deaker v. Bell Helicopter Textron, Inc.*, No. H-94-2387, slip op. at 8-9.

dispute that the first defendant received these petitions many more than 30 days before Shell attempted to remove the cases. Moreover, the court cannot help noticing that the very paper Shell asserts provided the first indication of removability belies Shell's claim. In that paper plaintiffs state that

> Dow has filed a motion to dismiss the claims of the Guatemalan plaintiffs in this case on the ground that the Court lacks subject matter jurisdiction over those claims. Certain other defendants adopted Dow's motion. Dow contends that under § 71.031, a plaintiff bringing suit in Texas must come from a country which has "equal treaty rights" with the United States. If no such equal treaty rights exist, Dow argues, then the Court lacks subject matter jurisdiction over the plaintiff's claims. Dow contends that the United States and Guatemala do not share "equal treaty rights."[46]

It is obvious from this paper that defendants were aware of the dispute over the existence, interpretation, effect, and validity of treaties between the United States and other countries well before they received plaintiffs' response. Because Shell has failed to demonstrate that this knowledge arose less than 30 days before its removal notice was filed, the court concludes that Shell's attempt

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[46] Plaintiffs' Response to Defendant Dow Chemical Company's Motion to Dismiss for Lack of Subject Matter Jurisdiction in *Borja v. Shell Oil Co.*, No. 93-320-F (116th District Court of Dallas County, Texas), attached as Exhibit C to Shell Oil Co.'s Notice of Joinder in Removal and Supplemental Notice of Removal, Docket Entry No. 9 in H-94-1337, at 1.

to predicate removal of these cases on the dispute over treaty rights was untimely.

3. Foreign relations

Finally, Shell argues that the existence of a removable federal question was first revealed by statements of the Ambassadors to the United States from Costa Rica and Honduras contained in letters to the court and to Secretary of State Warren Christopher. According to Shell these letters give rise to federal question jurisdiction because they indicate that the foreign relations of the United States will be affected by the decisions in these cases.

While it is true that "the body of law which pertains to . . . issues of international dimension may be classified as federal common law,"[47] and that federal question "§ 1331 jurisdiction will support claims founded upon federal common law as well as those of a statutory origin,"[48] not every claim implicating the international law of foreign relations will give rise to federal question jurisdiction. Defendants must still demonstrate that plaintiffs' claims arise under federal law – i.e., that they

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[47] *Chapalain Compagnie v. Standard Oil Co. (Indiana)*, 467 F.Supp. 181, 185 (N.D.Ill.1978). *See also Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 425, 84 S.Ct. 923, 939, 11 L.Ed.2d 804 (1964) ("[A]n issue concerned with a basic choice regarding the competence and function of the Judiciary and the National Executive in ordering our relationships with other members of the international community must be treated exclusively as an aspect of federal law.").

[48] *Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91, 100, 92 S.Ct. 1385, 1391, 31 L.Ed.2d 712 (1972).

satisfy the well-pleaded complaint rule.[49] *See Aquafaith* (Cite as: 890 F.Supp. 1324, *1349) *Shipping, Ltd. v. Jarillas*, 963 F.2d 806, 808 (5th Cir.), cert. denied, 506 U.S. 955, 113 S.Ct. 413, 121 L.Ed.2d 337 (1992) ("Defense counsel's erudite arguments about the federal common law of foreign relations are foreclosed by the familiar well-pleaded complaint rule."); *Handel v. Artukovic*, 601 F.Supp. 1421, 1426 (C.D.Cal.1985) ("Plaintiffs' international law claims, like their treaty claims, must 'arise under' the 'laws of the United States' for jurisdiction to lie.").

Defendants argue that plaintiffs' petitions satisfy the well-pleaded complaint rule because plaintiffs' claims should have included allegations attacking the sufficiency of the programs and regulations adopted by their

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[49] "[I]f a question of federal law does not appear on the face of a plaintiff's [well-pleaded] complaint, federal question jurisdiction does not exist. . . . " *Anderson v. American Airlines, Inc.*, 2 F.3d 590, 593 (5th Cir.1993). Perhaps the most famous statement of the well-pleaded complaint rule is that made by Justice Cardozo: How and when a case arises 'under the Constitution or laws of the United States' has been much considered in the books. Some tests are well established. To bring a case within the statute, a right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff's cause of action. The right or immunity must be such that it will be supported if the Constitution or laws of the United States are given one construction or effect, and defeated if they receive another. A genuine and present controversy, not merely a possible or conjectural one, must exist with reference thereto, and the controversy must be disclosed upon the face of the complaint, unaided by the answer or by the petition for removal.

Gully v. First Nat'l Bank in Meridian, 299 U.S. 109, 112-13, 57 S.Ct. 96, 97-98, 81 L.Ed. 70 (1936) (citations omitted).

own governments to protect them from the injuries they suffered or to compensate them after they were injured. The court is not persuaded by this argument. Because plaintiffs' § 71.031 claims seek nothing but damages, defendants' argument amounts to no more than the fear that a state court might impose liability for actions taken abroad that did not violate local government regulations. To the extent that defendants seek to pursue a defensive strategy alleging that at least some of their actions should be insulated from liability because those actions were taken in compliance with regulations, programs, and policies of the United States government or one or more foreign governments, this strategy is insufficient to transform the plaintiffs' claims into federal questions. Thus, although important issues of international significance might be implicated by the decisions made by a state court in this case, because no removable federal question implicating the international law of foreign relations necessarily appears in any claim within plaintiffs' well-pleaded petitions, the court concludes that Shell's second supplemental removal notice fails to establish the existence of federal subject matter jurisdiction.

D. Is Remand Warranted?

Defendants, using the last removal arrows in their quiver, argue that *Jorge Carcamo, Rodriguez, Erazo,* and *Valdez* should not be remanded even if Dead Sea's removal of these cases was premature. They argue that "by virtue of the power granted under [28 U.S.C.

§§ 1447(a)[50] and 1448,[51] the court] can grant . . . leave to serve Dead Sea, thus eliminating plaintiffs' complaint and allowing this litigation to proceed to an efficient conclusion."[52] Once again the parties have identified an issue that defies a categorical response, for the same case that instructs this court to evaluate a party's "power to remove . . . at the time of removal," also applied 12 U.S.C. § 1819(b)(2) retroactively to cure jurisdictional defects that existed when the Federal Savings and Loan Insurance Corporation (FSLIC) effected its removal. *FSLIC v. Griffin*, 935 F.2d 691, 696 (5th Cir.1991). Defendants do not cite, and the court's independent research has failed to uncover, a single case employing § 1447(a) or § 1448 (or any of the federal statutes that are the predecessors of these sections) retroactively to correct a private party's premature removal.

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[50] Section 1447(a) provides that "the district court may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the State court or otherwise."

[51] The first paragraph of § 1448 states:

> In all cases removed from any State court to any district court of the United States in which any one or more of the defendants has not been served with process or in which the service has not been perfected prior to removal, or in which process served proves to be defective, such process or service may be completed or new process issued in the same manner as in cases originally filed in such district court.

[52] Dow Chemical Company's Memorandum in Opposition to Plaintiffs' Emergency Motion to Remand and Intervenors' Motion to Remand, Docket Entry No. 16 in H-94-1359, at 19.

The court need not plumb these uncharted waters with respect to *Rodriguez* or *Erazo*, however, because even if §§ 1447(a) and 1448 empower the court to do so, neither these statutes nor Fed.R.Civ.P. 14(a)[53] compels that result. The court is persuaded that it should not grant leave to serve third-party petitions on Dead Sea in either *Rodriguez* or *Erazo*. In addition to amending their pleadings and filing stipulations reflecting their intention not to pursue relief from injuries arising from Dead Sea's products, plaintiffs have also entered settlement agreements with Dead Sea. Under these circumstances the court is unwilling to usurp the state courts' authority to examine, in the first instance, whether Dead Sea should be impleaded into the case at this point in the litigation. Cf. *International Primate Protection League v. Tulane Educational Fund*, 500 U.S. 72, 86-89, 111 S.Ct. 1700, 1709-10, 114 L.Ed.2d 134 (1991) (remanding action against federal agency instead of upholding dismissal for plaintiffs' lack of federal constitutional standing because post-remand determination whether federal agency is an indispensable

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[53] Rule 14(a) provides, in relevant part, that

> [a]t any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action.

party and whether plaintiffs should be allowed to substitute an individual federal official for the federal agency would be determined by state law). Accordingly, the court concludes that *Rodriguez* and *Erazo* should be remanded.[54]

In *Jorge Carcamo* and *Valdez*, however, the question is more complex. In these cases federal courts allowed Dow to file an amended, third-party complaint against Dead Sea pursuant to Fed.R.Civ.P. 14(a).[55] Were the court to remand these actions in their current posture plaintiffs would be powerless to delay Dead Sea from immediately exercising its presently mature right to again remove the actions to federal court. The court will not subject the parties to the unnecessary expense and potential delay inherent in such circularity of litigation.[56] Accordingly,

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[54] Because these cases will be remanded any unaddressed pending motion in these cases must be addressed to the state courts. Accordingly, the state courts must still determine whether Dead Sea should be joined and may also consider whether any defendant's special appearance should be granted.

[55] The court is not persuaded by plaintiffs' recent argument that the propriety of the court's order granting Dow's motion for leave to serve an amended third-party complaint against Dead Sea, et al., in *Valdez* is questionable because Israel no longer owned a majority of Dead Sea when the order was entered. As explained in note 33, *supra*, the dispositive date is when plaintiffs' alleged exposure to DBCP occurred. At the time of plaintiffs' alleged exposure to DBCP manufactured by Dead Sea, Israel owned a majority of Dead Sea.

[56] *See Fenelon v. Duplessis*, Nos. 91-0810, 91-1011 and 91-1012, 1991 WL 99391 at *1 (E.D.La. May 28, 1991), aff'd without published opinion, 997 F.2d 880 (5th Cir.1993) ("Finally, the defendants have noted that if this matter were remanded, it would be removed again under 28 U.S.C. § 2679(d)(2) . . . [a]

while the court concludes that *Rodriguez* and *Erazo* must be remanded because Dead Sea removed them prematurely, the court concludes that *Jorge Carcamo* and *Valdez* may remain in federal court.

IV. Dismissal Motions

A. Which Dismissal Motion Should Be Resolved First?

Plaintiffs ask the court to dismiss defendants' third-party actions against Dead Sea because they lack merit or

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provision [that] has no time limit. Thus, even if remand were proper in this case, it would be futile because this matter would once again be removed."). *See also Asarco, Inc. v. Glenara, Ltd.*, 912 F.2d 784, 787 (5th Cir.1990) (refusing to require remand that "would be a futile gesture, wasteful of scarce judicial resources . . . " because state court would be bound by federal court's personal jurisdiction analysis); *Bell v. City of Kellogg*, 922 F.2d 1418, 1424-25 (9th Cir.1991) ("Where . . . remand to state court would be futile . . . the desire to have state courts resolve state law issues is lacking. We do not believe Congress intended to ignore the interest of efficient use of judicial resources. . . . The district court correctly resolved the whole case by dismissing it because a remand to state court would have been futile."); cf. *Mignogna v. Sair Aviation, Inc.*, 937 F.2d 37, 41 (2d Cir.1991) ("On the other hand, remand might be improper if it would be futile. . . . "); *Hood v. Security Bank of Huntington*, 562 F.Supp. 749, 751 (S.D.Ohio 1983) ("If we were to dismiss plaintiff's claim against the [Small Business Administration] . . . and ordered the case remanded to state court, the Bank would immediately exercise its right to implead the SBA as a third-party defendant. At that time, the SBA would have the right to have the case removed to federal court. . . . Because we do not view this as a very efficient use of either the Court's or the parties' time and energy, we have concluded that it is best to leave the parties as they stand. . . . ").

to sever the third-party actions and then to remand the remainder of the actions to various state courts. Defendants ask the court to dismiss all of the actions in their entirety by declining to exercise jurisdiction under the doctrine of forum non conveniens (f.n.c.). The court is persuaded that it must examine defendants' motion first[57] in order to avoid the possibility of remanding any of the actions to an equally inconvenient state forum. *See Nolan v. Boeing Co.*, 919 F.2d at 1069-70 (rejecting plaintiffs' argument that "a federal court [should] remand rather than dismiss when a case is removed from a state court jurisdiction that would not dismiss on forum non conveniens grounds" because "[i]t would be anomalous to conclude that while a district court may properly invoke the federal law of forum non conveniens to decline jurisdiction over a properly removed case, it must

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[57] Ordinarily "the doctrine of forum non conveniens can never apply if there is absence of jurisdiction or mistake of venue." *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 504, 67 S.Ct. 839, 841, 91 L.Ed. 1055 (1947). Accordingly, the court would ordinarily be forced to address the motions to dismiss for lack of personal jurisdiction over the Standard Fruit entities still pending in several of these cases before tackling the motion to dismiss for f.n.c. However, the court is persuaded that "this is one of the rare cases in which [it can] properly proceed to resolve the forum non conveniens issues first, without the need to address the [in personam] jurisdictional contest . . . [because] the arguments in favor of dismissal are strong, and the jurisdictional objections are inapposite to all but a few parties. . . . " Syndicate 420 at *Lloyd's London v. Early American Ins. Co.*, 796 F.2d 821, 826 n. 8 (5th Cir.1986). Moreover, the Standard Fruit entities have stipulated their willingness to delay consideration of their motions attacking personal jurisdiction until after the court has ruled on defendants' f.n.c. motion. (Docket Entry No. 258 in H-94-1337).

order the case to be reinstituted in an equally if not more inconvenient forum"). Before addressing the merits of the motion to dismiss these actions for f.n.c., however, the court must first determine whether defendants have waived or should be estopped from asserting that this court is an inconvenient forum.

B. Have Defendants Waived the Right to Seek Forum Non Conveniens Dismissal?

1. Have defendants waived the right to seek dismissal by relying on Tex.Civ.Prac. & Rem.Code Ann. § 71.031 as a basis for federal jurisdiction?

Plaintiffs argue that defendants are not entitled to assert the federal law of forum non conveniens because they affirmatively asserted that federal question jurisdiction is provided by the "equal treaty rights" clause of § 71.031(a)(3). Without citing any authority plaintiffs urge the court to bind defendants to an application of the "anti-forum non conveniens dismissal provision" of that Texas statute. The court declines to do so because it is aware of no exception to the rule that "a federal court . . . is required to apply the federal law of forum non conveniens when addressing motions to dismiss a plaintiff's case to a foreign forum . . . in all cases regardless of their jurisdictional bases or subject matter." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1159, 1163 (5th Cir.1987) (en banc) (emphasis in the original), vacated sub nom. *Pan American World Airways, Inc. v. Lopez*, 490 U.S. 1032, 109 S.Ct. 1928, 104 L.Ed.2d 400, relevant holding reinstated, 883 F.2d 17 (5th Cir.1989) (en banc).

Alternatively, to the extent that such an exception might exist in an appropriate case, the court is persuaded that the cases before it do not fall within the ambit of any exception. The crux of plaintiffs' argument is that defendants waived the right to seek f.n.c. dismissal by asserting that plaintiffs' § 71.031 causes of action present removable federal questions. To succeed in that assertion defendants would have to demonstrate that plaintiffs' state-law causes of action nevertheless "arise under" federal law because a question of federal law is an essential element of those claims. Viewed in this light the conclusion plaintiffs urge is illogical; surely defendants did not waive the right to seek application of federal f.n.c. law by attempting to demonstrate that federal law is an essential element of plaintiffs' state-law causes of action.

2. Have defendants waived the right to seek dismissal by pursuing transfers of several cases to this court from other districts pursuant to 28 U.S.C. § 1404(a)?

Citing *Insurance Co. of North America v. Ozean/Stinnes-Linien*, 367 F.2d 224, 226-27 (5th Cir.1966) (reversing f.n.c. dismissal where f.n.c. motion was prosecuted only after defendant's motion to transfer from New Orleans to Savannah had been granted), plaintiffs argue that defendants waived the right to pursue f.n.c. dismissal in all of these cases when they sought transfer of *Valdez* and *Isae Carcamo* from the Marshall Division of the Eastern District of Texas to this court. The *Ozean/Stinnes-Linien* court predicated its decision on the inequitable conduct of the defendant:

> The transfer to the Southern District of Georgia, Savannah Division . . . was "[f]or the convenience of the parties and witnesses" and presupposes that the case would be tried on its merits in the district court at Savannah. . . .
>
> The libelant lost his choice of forum and had to prepare for trial in Savannah. The respondent cannot now be permitted to contend that, after all, Savannah is not the most appropriate place for a trial on the merits and, upon such contention, to have the libel dismissed.

Id. at 222-27.

Accordingly, the court held that the language in defendant's brief in support of the motion to transfer amounted to a waiver of the right to later prosecute f.n.c. dismissal. *Id.* at 227.

Assuming arguendo that the holding of *Ozean/Stinnes-Linien* was not disturbed by the fact that in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 102 S.Ct. 252, 70 L.Ed.2d 419 (1981) "the United States Supreme Court . . . upheld, without any discussion of estoppel, a district court's dismissal under forum non conveniens even where the case had previously been removed to federal court and transferred to a different federal forum under § 1404(a),"[58] the transfer of *Valdez* and *Isae Carcamo* to this court was accomplished under very different circumstances from those present in *Ozean/Stinnes-Linien*.

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[58] *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 835 (5th Cir.), cert. denied, 508 U.S. 973, 113 S.Ct. 2963, 125 L.Ed.2d 663 (1993).

In addition to filing a motion to consolidate *Valdez* and *Isae Carcamo* on April 25, 1994, Shell moved to transfer both cases to this court.[59] Of particular relevance to plaintiffs' current argument, the motion stated that "[w]hile no United States forum is truly convenient for these claims . . . transfer of the consolidated case to the Houston Division, where two other related cases are currently pending, would be less inconvenient for both the parties and the witnesses."[60] Four days later, on April 29, 1994, the Chiquita entities joined Shell's motion.[61] Shell's Reply to Plaintiffs' Response and Opposition to Shell's Motion to Transfer, filed on May 27, 1994, notified plaintiffs and the court that "Shell does not intend by prosecuting this Motion to waive any forum non conveniens challenge or any other legal right it or other defendants might have"[62] and explained that transfer would further the interests of justice because "common issues in the related cases, such as federal jurisdiction, remand to state court, and forum non conveniens, should be dealt with at one time by one judge."[63] Although the motions were denied by Magistrate Judge Radford,[64] Shell and the Chiquita entities sought review in the district court by filing objections to that order.[65] Among the arguments advanced by Shell and Chiquita for reversal of Judge

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[59] Docket Entry No. 11 in H-95-1356.

[60] *Id.* at 2, ¶ 3.

[61] Docket Entry No. 17 in H-95-1356.

[62] Docket Entry No. 57 in H-95-1356, at 2 n. 2.

[63] *Id.* at 5.

[64] Docket Entry No. 136 in H-95-1356.

[65] Docket Entry No. 144 in H-95-1356.

Radford's order was the fact that submission of defendants' motion to dismiss for f.n.c. was soon to be filed in all of the cases that had been consolidated in this court. "To avoid unnecessary expenditure of judicial resources in ruling on essentially identical motions to dismiss for forum non-conveniens, this case should be transferred to the Southern District, Houston Division for consolidation with the other four DBCP cases pending there."[66]

A transfer order issued under the circumstances present in *Valdez* and *Isae Carcamo* is not the equivalent of the transfer order in *Ozean/Stinnes-Linien*. Plaintiffs lost their initial forum choice when Judge Radford denied their motions to remand the actions to state court[67] before Judge Steger transferred the cases to this court. Moreover, defendants' actions could not have given plaintiffs the false impression that transfer to this court would be followed by a trial on the merits in this court without further pretrial motions. Defendants repeatedly and vigorously asserted that they intended to seek f.n.c. dismissal of all cases once transfer was accomplished. The court is therefore persuaded that defendants did not waive the right to seek such dismissal in any of the papers relating to the motion to transfer in *Valdez* and *Isae Carcamo*.

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[66] *Id.* at 3.

[67] Docket Entry No. 137 in H-95-1356.

3. Did Dow waive the right to seek dismissal by initiating a declaratory judgment action in the United States District Court for the Northern District of Texas?

Plaintiffs argue that by commencing a declaratory judgment action in the Northern District of Texas in 1993 asserting, inter alia, that plaintiffs' claims against Dow are preempted by FIFRA,[68] Dow waived its right to seek f.n.c. dismissal because it essentially admitted "that (1) federal district court in Texas [is] a convenient forum in which to litigate these claims; and (2) American law [is] applicable to Dow's conduct."[69] A waiver occurs when one voluntarily or intentionally surrenders a known right.[70] Although "[g]enerally, waiver is a fact question turning on the question of intent[,] . . . the issue of waiver becomes a matter of law . . . whe[n] material facts and circumstances are undisputed or clearly established and there is no room for argument or inference."[71]

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[68] *Dow Chemical Co. v. Abarca*, No. 3-93-CV1686-X.

[69] Plaintiffs' Response to Defendants' Motion to Dismiss on Forum Non Conveniens and Comity Grounds, Docket Entry No. 275 in H-94-1337, at 8.

[70] *Salzstein v. Bekins Van Lines, Inc.*, 993 F.2d 1187, 1191 (5th Cir.1993); *First Interstate Bank of Arizona, N.A. v. Interfund Corp.*, 924 F.2d 588, 595 (5th Cir.1991) ("Under Texas law, waiver is a voluntary, intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right. The elements of waiver are: (1) an existing right, benefit, or advantage; (2) knowledge . . . of its existence; and (3) actual intent to relinquish the right, which can be inferred from conduct." (citations omitted)).

[71] *First Interstate Bank v. Interfund Corp.*, 924 F.2d at 595.

It is undisputed that the state courts in which plaintiffs' actions were originally pending could not have ordered dismissal for f.n.c. Plaintiffs admit that Dow caused its declaratory judgment action to be voluntarily dismissed pursuant to Fed.R.Civ.P. 41(a) when plaintiffs' actions were removed to federal court by Dead Sea. Under the circumstances the court concludes that Dow did not voluntarily or intentionally surrender a right it then possessed or knew that it would possess in the future by filing its declaratory judgment action in federal court.

Though couched in terms of waiver plaintiffs' argument also appears to implicate one or more of the doctrines of estoppel. Defendants have submitted uncontradicted evidence that Dow's declaratory judgment action was dismissed before any adverse party answered and before the court took any action in the case. Accordingly, neither collateral estoppel[72] nor judicial estoppel[73] can bar Dow from taking its current

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[72] "Collateral estoppel . . . prevent[s] a party from relitigating ultimate issues of fact that already have been resolved against that party. . . . The agreed orders entered previously by the court could not justify imposition of collateral estoppel because they did not constitute fully litigated and finally decided decisions on the merits." *Teledyne Industries, Inc. v. NLRB*, 911 F.2d 1214, 1220 (6th Cir.1990).

[73] "Judicial estoppel applies where a party tries to contradict in a second lawsuit his sworn statement in previous litigation." *Grant v. Lone Star Co.*, 21 F.3d 649, 651 n. 2 (5th Cir.), cert. denied, 513 U.S. 1015, 115 S.Ct. 574, 130 L.Ed.2d 491 (1994). "The majority view is that judicial estoppel does not apply unless the party has been successful in persuading a court to accept its position." *Moore v. United Services Automobile Ass'n*,

position. There are two more doctrines of estoppel, however: equitable estoppel and quasi estoppel.

Equitable estoppel serves to protect litigants from unscrupulous opponents who induce a litigant's reliance on a position, then reverse themselves to argue that they win under the opposite scenario. A party may invoke equitable estoppel to prevent the opposing party from changing positions if (1) the party was an adverse party in the prior proceeding; (2) the party detrimentally relied on the opponent's prior position; and (3) the party would now be prejudiced if the opponent changed positions.

Teledyne Industries, Inc. v. NLRB, 911 F.2d at 1220. Accord, *Joleewu, Ltd. v. City of Austin*, 916 F.2d 250, 252-53 (5th Cir.1990), cert. denied, 500 U.S. 904, 111 S.Ct. 1683, 114 L.Ed.2d 78 vacated in part on unrelated grounds, 934 F.2d 621 (5th Cir.1991) ("Under Texas law, one party may be estopped to assert a legal position against another if that position is inconsistent with a previous one. . . . [However, e]quitable estoppel bars the taking of inconsistent positions in judicial proceedings only if two other elements – reliance and injury of the opposing party – are also established."). Plaintiffs cannot establish either of the last two elements. Plaintiffs have made no showing that they detrimentally relied on Dow's conduct with respect to the current motions to dismiss for f.n.c. or that failure

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808 F.2d 1147, 1153 n. 6 (5th Cir.1987). "We do not imply that judicial acceptance only occurs where a party ultimately prevails on the merits. 'Rather, judicial acceptance means only that the first court has adopted the position urged by the party, either as a preliminary matter or as part of a final disposition.' " *Teledyne Industries, Inc. v. NLRB*, 911 F.2d at 1218.

to estop Dow will prejudice plaintiffs. Moreover, even if Dow were estopped from pursuing f.n.c. dismissal, nothing prohibits any other defendant from arguing that the entire controversy – including the aspects relating to Dow's liability and defenses – should be dismissed.

> Quasi estoppel was developed to prevent a party from retaining a benefit by asserting a position to the disadvantage of another and then asserting a right which is inconsistent with that previous position. Quasi estoppel differs from equitable estoppel . . . in that quasi-estoppel requires no concealment or misrepresentation of existing facts on the one side and no ignorance or reliance on the other.
>
> To create a quasi estoppel, [plaintiff] would have to show that [defendant] can be equitably charged with choosing to accept benefits in a manner genuinely inconsistent with his subsequent claim.

Neiman-Marcus Group, Inc. v. Dworkin, 919 F.2d 368, 371 (5th Cir.1990). The court is not persuaded that Dow can be equitably charged with "accepting" a benefit that is inconsistent with its current motion to dismiss simply because it filed and then abandoned an action that might have resulted in such a benefit. Accordingly, the court concludes that Dow did not waive and is not estopped from pursuing f.n.c. dismissal of these cases because of the declaratory judgment action it brought in the Northern District of Texas.

4. Have defendants waived the right to seek dismissal by participating in discovery?

Plaintiffs argue that "[b]ecause defendants have enjoyed the benefits of the American system [of discovery] for two years and because the competitive advantage they have obtained is fundamentally unfair, [d]efendants should be estopped from seeking forum non conveniens dismissal."[74] Although the amount of discovery that has taken place is a factor to be considered in determining whether a case should be dismissed for f.n.c., plaintiffs' argument is not tenable in these actions. The extent of discovery was discussed by the court and counsel for Dow, Walter F. Conrad, and plaintiffs' counsel, Charles Siegel, at a status conference on December 21, 1994:

The Court: You all know a lot more about how much discovery was conducted before the cases were removed and how much has been conducted now and how much you have in other cases.

Mr. Conrad: To bring the court up to date on that one, the amount of merits discovery is infinitesimal. Of 20,000 plaintiffs we have probably been able to depose 20. I would think that not until the jurisdictional questions are resolved do we get to the merits discovery part of the case. Both sides have agreed upon that. . . .

Mr. Siegel: In one sense it is not true that the amount of merits discovery that has gone on is infinitesimal. It is true they have deposed 20 plaintiffs. We have taken a few

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[74] Plaintiffs' Response to Defendants' Motion to Dismiss on Forum Non Conveniens and Comity Grounds, Docket Entry No. 275 in H-94-1337, at 9.

depositions that we are just getting started on liabilit[y] issues when the cases were removed. But outside the formal discovery process, the plaintiffs have given to the defendants a tremendous amount of information, specifically a questionnaire . . . [and] several thousand medical tests.[75]

The court is not persuaded that defendants have waived or should be estopped from pursuing dismissal for f.n.c. because they engaged in this very limited discovery supplemented by informal, voluntary exchange of documents with plaintiffs.[76]

C. Forum Non Conveniens

1. Standard of review

When considering a motion to dismiss for f.n.c. "the ultimate inquiry is where trial will best serve the convenience of the parties and the ends of justice." *Koster v. Lumbermen's Mutual Casualty Co.*, 330 U.S. 518, 527, 67 S.Ct. 828, 833, 91 L.Ed. 1067 (1947). "[T]he decision to grant or deny a motion to dismiss for forum non conveniens is within the discretion of the district court, [but] it should be an exercise in structured discretion founded on

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[75] Transcription of Hearing, Docket Entry No. 261 in H-94-1337, at 6-7.

[76] Counsel for the Standard Fruit entities, Terry Murphy, provided evidence that plaintiffs derived some benefit from participating in voluntary transfer of documents because, at the same status conference, he reported that the defendants "did settle 50 of 20,000 cases after extensively going through the information th[ey] received from plaintiffs. . . . " *Id.* at 13.

a procedural framework guiding the district court's decisionmaking process." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d at 1165 (citations omitted).

The Fifth Circuit has fashioned "[a] forum non conveniens analysis involv[ing] a three step inquiry. First, the court must determine whether there exists another forum that is available to the litigants and would provide an adequate remedy to the prevailing party. . . . " *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d at 835.

> If the court concludes that the foreign forum is both available and adequate, it should then consider all of the relevant factors of private interest, weighing in the balance the relevant deference given the particular plaintiff's initial choice of forum. . . .
>
> If the district court finds that the private interests do not weigh in favor of the dismissal, it must then consider the public interest factors.

In re Air Crash Disaster Near New Orleans, La., 821 F.2d at 1165. "[A] forum non conveniens dismissal must be based on the finding that, when weighed against plaintiff's choice of forum, the relevant public and private interests strongly favor a specific, adequate and available alternative forum." *Veba-Chemie A.G. v. M/V GETAFIX*, 711 F.2d 1243, 1245 (5th Cir.1983). Defendants bear the "burden of persuasion . . . [as] to all the elements of the forum non conveniens analysis." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d at 1164.

2. Availability of an adequate alternative forum

Because "[i]n all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process," *Gulf Oil Corp. v. Gilbert*, 330 U.S. at 506-07, 67 S.Ct. at 842, "[a] forum non conveniens dismissal should never be granted . . . unless the defendant can satisfy the court that an adequate and available alternative forum exists." *Perusahaan Umum Listrik Negara Pusat v. M/V TEL AVIV*, 711 F.2d 1231, 1238 (5th Cir.1983). Determining whether an alternative forum is available and adequate is a two-step inquiry.

> A foreign forum is available when the entire case and all parties can come within the jurisdiction of that forum. A foreign forum is adequate when the parties will not be deprived of all remedies or treated unfairly even though they may not enjoy the same benefits as they might receive in an American court.

In re Air Crash Disaster Near New Orleans, La., 821 F.2d at 1165 (citations omitted).

a. Availability

Plaintiffs, relying on *Fiacco v. United Technologies Corp.*,[77] argue that many of their home countries do not

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[77] 524 F.Supp. 858, 862 (S.D.N.Y.1981) (*pre-Piper Aircraft Co. v. Reyno* decision holding that "[w]here of two possible forums one is possible only because the defendant consents to make it possible by submitting to its jurisdiction, it seems to me that

provide an available alternative forum because many of the defendants are not subject to personal jurisdiction in those courts. The Supreme Court's observation that "[o]rdinarily, th[e availability] requirement will be satisfied when the defendant is 'amenable to process' in the other jurisdiction," *Piper Aircraft Co. v. Reyno*, 454 U.S. at 255 n. 22, 102 S.Ct. at 265 n. 22, led the Fifth Circuit to hold that "defendant's submission to the jurisdiction of an alternative forum renders that forum available for the purposes of forum non conveniens analysis . . . [and to conclude that] condition[ing] dismissal . . . [upon] defendant's submission to the jurisdiction of an alternative forum is one particularly effective manner of assuring that the alternative forum is available." *Veba-Chemie A.G. v. M/V GETAFIX*, 711 F.2d at 1245, 1249.

Plaintiffs argue that consent by defendants may not be sufficient because the courts in several of their home countries will decline to exercise jurisdiction over consenting defendants because plaintiffs initiated the action elsewhere. In Syndicate 420 at *Lloyd's London v. Early American Ins. Co.* the court refined the holding in *Veba-Chemie A.G. v. M/V GETAFIX* in a way that satisfies plaintiffs' concerns:

> [*Veba-Chemie A.G. v. M/V GETAFIX*] does not account for the possibility that, on issuance of the forum non conveniens dismissal and with

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the . . . relative criteria should weigh much more heavily. A plaintiff, who jurisdictionally has the right to proceed in one jurisdiction, should not . . . be required to proceed if at all only in another jurisdiction where jurisdiction will exist not as a matter of law but as a matter of conscious choice on the part of the party against whom he seeks recovery.").

> complete compliance with the conditions imposed on that dismissal, the British courts would nonetheless decline to permit the joinder or intervention of the parties other than Syndicate 420, already an intervenor.
>
> In order to ensure an available foreign forum, we make explicit the fact that the dismissal is conditioned upon the willingness of the English courts to hear this case as transferred by a sister American court.

796 F.2d at 830. To ensure availability of an alternative forum in the event that defendants' motion is ultimately successful the court will condition dismissal not only on the defendants' and third-party defendants' stipulation to waive all jurisdictional and limitations defenses but also upon acceptance of jurisdiction by the foreign courts involved in these cases.

Plaintiffs also argue that the courts of Nicaragua are unavailable because they are not functioning. Plaintiffs base this argument on the affidavit of Dr. Margarita Ramirez Tapia and a number of news articles describing a standoff between the legislature, the National Assembly, and the president, Violeta Barrios de Chamorro, concerning implementation of certain constitutional reforms. The standoff, which began in February of 1995, was precipitated by President Chamorro's refusal to publish the reforms enacted by the legislature. Among the reforms were provisions designed to control nepotism in the succession of presidents and provisions enlarging the supreme court from nine to twelve justices. The reforms also transferred the power to appoint supreme court justices from the president to the legislature. The supreme

court refused to seat five new justices appointed by the legislature, and because only six active justices remained from the original contingent of nine, the court was unable to obtain a quorum necessary to resolve the impasse concerning the effectiveness of the constitutional reforms.

While this information is relevant to the function of the Supreme Court of Nicaragua, plaintiffs do not inform the court how this situation affects plaintiffs' access to a trial court in Nicaragua. Moreover, in the interim since plaintiffs briefed the issue, the bulk of the standoff – with the notable exception of the situation concerning the newly appointed supreme court justices – has been resolved.[78] Accordingly, the court concludes that the courts of Nicaragua remain available to plaintiffs.

b. Adequacy

Plaintiffs argue that the courts of their home countries are inadequate because, in the event that each decides to apply its own law, none of them provide

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[78] *See*, e.g., National Assembly Approves Constitutional Amendments, Xinhua News Agency, July 4, 1995, available in LEXIS, News Library, Non-US file (describing National Assembly's July 4, 1995, vote to approve new constitutional amendments pursuant to the accord reached on June 30, 1995, between Chamorro and the National Assembly); Chamorro Says Political Agreement Attests to "True Exercise of Democracy", BBC Summary of World Broadcasts, July 3, 1995, available in LEXIS, News Library, Non-US file (presidential speech stating that the final accord included the formation of a Supreme Electoral Council by consensus); David R. Dye, A Chamorro Dynasty Dashed in Deal Struck in Nicaragua, Christian Science Monitor, June 20, 1995, World sect., at 6.

remedies that are comparable to the products liability cause of action available in a Texas forum applying Texas law (or the law of one or more other states of the United States). In many instances, however, plaintiffs inject considerations relevant only to a balancing of the litigants' various private interests[79] into their argument concerning

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[79] For example, plaintiffs repeatedly argue that contingent attorney's fee contracts are either illegal or unethical in many of their home countries and that their expected recovery will be greatly diminished if they are forced to pursue an action in the courts of their home countries for a variety of reasons including the fact that most other countries do not employ civil juries; that many do not allow recovery of non-economic harm or punitive damages; that the number of witnesses will be severely limited and that a plaintiff or his family members may not be allowed to testify; or that deposition testimony cannot be substituted for the testimony of live witnesses. The court is persuaded that a forum that provides an impartial trier of fact and supplies an avenue to recover some measure of compensatory damages for physical injuries such as those suffered by plaintiffs is an adequate forum. All of the cases cited by plaintiffs are consistent with the view that after the Supreme Court's decision in *Piper Aircraft v. Reyno* the alleged deficiencies in the judicial systems of the plaintiffs' home countries are relevant only to the balancing of private interests that will be conducted in the event that adequate alternative fora are found to exist. *See*, e.g., *Coakes v. Arabian American Oil Co.*, 831 F.2d 572, 575-76 (5th Cir.1987) ("The Coakes' contention is simply that England is not an adequate alternative forum because it will not allow them to hire an English solicitor on a contingency-fee basis. . . . It is . . . our view[, however,] that the fact that contingent fees are legally permissible in the United States but legally impermissible in England is not a factor that controls or even significantly influences the forum non conveniens determination in this case."); *Reid-Walen v. Hansen*, 933 F.2d 1390, 1398-99 (8th Cir.1991) (considering "the realities of the plaintiff's position, financial and otherwise" including the lack

the court's review of the adequacy of an alternative forum. The Fifth Circuit has clarified that a court may conclude that an adequate alternative forum exists even though plaintiffs may not find a substantially comparable remedy in the foreign forum.

Piper Aircraft held that a difference in the substantive law governing the action "should not be given conclusive or even substantial weight in the forum non conveniens inquiry." In *Piper* that meant that the unavailability of strict liability as a theory of recovery was insufficient to render a Scottish forum inadequate for the resolution of a products liability action. The Supreme Court recognized, however, that there will be circumstances in which the remedy afforded by the alternative forum will be so clearly inadequate or unsatisfactory "that dismissal would not be in the interest of justice." Those circumstances do not arise unless a party "will be deprived of any remedy or [will be] treated unfairly."

Syndicate 420 at *Lloyd's London v. Early American Ins. Co.*, 796 F.2d at 829. Accord, *Kempe v. Ocean Drilling & Exploration Co.*, 876 F.2d 1138, 1145 (5th Cir.), cert. denied, 493 U.S. 918, 110 S.Ct. 279, 107 L.Ed.2d 259 (1989) (declining to extend the rule that f.n.c. dismissal of actions involving only antitrust claims would be "the functional equivalent of denying the plaintiffs any remedy whatsoever" to an action that included a RICO claim that was not cognizable in Bermuda since plaintiffs' other tort claims were within the competence of "the Bermuda trial

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of contingent fee arrangements in Jamaica, "[a]s part of the Gilbert private interest analysis. . . . ").

courts"). With this standard in mind the court will address the adequacy of the remedies available under the laws of plaintiffs' home countries.

i. Burkina Faso

Defendants rely upon two affidavits prepared by the president of the Burkina Faso bar, Mr. le Batonnier Benoit Joseph Sawadogo. According to Mr. Sawadogo, workers who suffered injuries to their reproductive capacity as a result of exposure to DBCP in Burkina Faso may pursue a tort action against the entities that supplied that product to them in the courts of that country under a variety of provisions of the French Civil Code. While the affidavit of Dr. Bernardin Dabire submitted by plaintiffs does not contradict the relevant portions of Mr. Sawadogo's affidavit, Dr. Dabire questions whether any plaintiff will be able to maintain jurisdiction in Burkina Faso since all of the Burkina Faso plaintiffs were exposed to DBCP while working in the Ivory Coast and since none of the defendants are domiciled in Burkina Faso. Because any f.n.c. dismissal will be conditioned on defendants' waiver of jurisdictional defenses, the court is persuaded that Burkina Faso plaintiffs will not be treated unfairly or deprived of all remedies by the courts of that country.

ii. Costa Rica

Defendants submit the affidavits of Dr. Atilio Vincenzi, a former Justice of the Supreme Court of Costa Rica. Dr. Vincenzi states that Article 1045 of the Civil

Code provides a tort cause of action through which plaintiffs could pursue an action to recover damages from defendants for the injuries they suffered. Plaintiffs' fourth affiant on Costa Rican law, Professor Victor Perez Vargas, admits that "there is an abstract right to sue for damages . . . in article 1045 of the Civil Code" but states that this should be ignored because "no injured person . . . has ever filed an action based on a defective product against its manufacturers or distributors."[80] In the absence of evidence of an officially recognized legal impediment the court concludes that plaintiffs will not be treated unfairly or deprived of all remedies in the courts of Costa Rica. Moreover, Professor Vargas' affidavit also demonstrates the existence of a remedy under the Labor Code that could result in recovery from the plaintiffs' employers or through the Costa Rican analog to workers' compensation insurance for partial or total permanent disability.[81]

iii. Dominica

Defendants submit the affidavits of Anthony Waddy Astaphan, Vice-President of the Dominica Bar Association. Mr. Astaphan states that the Commonwealth of

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[80] Similarly, plaintiffs' seventh affiant on Costa Rican law, Professor Dora Maria Guzman Zanetti, admits that "there is in Costa Rica sufficient substantive and procedural legislation, applied by judges who are capable technically and morally" to justly resolve this litigation, but states that the great number of plaintiffs would cause lengthy delays in the resolution of their cases.

[81] *See* Articles 223 and 224 (¶¶ 434 & 435) of the Labor Code, translation of exhibits to Vargas' affidavit, at 6-7.

Dominica "subscribes to and applies faithfully the English common law," and that the English common law provides plaintiffs a tort cause of action that might lead to the recovery of damages for their injuries from any of the defendants found negligent and causally responsible for the injury. Plaintiffs' affiants on the law of Dominica do not question the accuracy of this statement. Accordingly, the court concludes that plaintiffs will not be treated unfairly or deprived of all remedies in the courts of the Commonwealth of Dominica.

iv. Ecuador

Defendants submit the affidavits of Dr. Enrique Ponce y Carbo, a former Justice of the Supreme Court of Ecuador. Dr. Ponce y Carbo states that Articles 2241 and 2256(5) of the Civil Code provide causes of action by which plaintiffs may pursue recovery for their injuries from defendants in negligence and strict liability. He also states that injured workers may recover damages to reproductive capacity under the Labor Code.[82]

Plaintiffs counter with the affidavits of Professor Alberto Wray and Dr. Julio Cesar Trujillo, former Head Justice of the Tribunal of Constitutional Guarantees. Both affiants state that plaintiffs would be unable to pursue actions directly against the manufacturers of DBCP in Ecuador, but provide slightly different reasons for their opinions. Both state that a court in Ecuador could not

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[82] Dr. Ponce y Carbo acknowledges that no remedy for this type of injury is specified in the Code but contends that a remedy may nevertheless be fashioned by the Ministry of Labor.

assert personal jurisdiction over unwilling defendants whose only contact with the forum was plaintiffs' exposure in Ecuador to products placed into the stream of commerce by defendants outside of Ecuador. They also agree that plaintiffs could not recover under a breach of contract theory in any event because no contractual relationship exists between the workers and the manufacturers.

Although Dr. Trujillo acknowledges that "it would be possible [to bring] suits for damages . . . against a company on the grounds of civil liability for defects in products manufactured by said company," he is not aware of any such suits in Ecuador, and in the present case states that such suits would be "pointless" because Ecuadorian courts would not have jurisdiction over the manufacturers.[83] Dr. Trujillo states that "the workers cannot sue said manufacturers in Ecuador[ ] because they do not have the procedural right to do so. Since no direct legal relationship, contractual or extra-contractual, exists between the manufacturers and the workers, the latter cannot sue the former in Ecuador."[84] Professor Wray states that workers could not pursue extra-contractual claims against the manufacturers because "there is no legal relationship that links the banana workers with the pesticide manufacturer."[85] In the next paragraph of his affidavit, however, Professor Wray acknowledges that Article 2241 of the Civil Code provides that "a person who suffers damage or injury as a consequence of the

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[83] Trujillo Affidavit, at 4.

[84] Trujillo Affidavit, at 2.

[85] Wray Affidavit, ¶ 8.

negligence or tort of another is entitled to bring an action against the latter for damages."[86] Professor Wray does not explain why the extra-contractual relationship established by Article 2241 does not provide Ecuadorian plaintiffs with a remedy against the manufacturer defendants.

Defendants respond to plaintiffs' affidavits with the affidavit of Professor Saul Litvinoff. Professor Litvinoff cites Article 2241 as one example of Code provisions establishing liability under the "civil law equivalent of the common law concept of tort . . . the notion of 'quasi-delict.' "[87] Professor Litvinoff also states that Article 2256(5) of the Civil Code provides a products liability cause of action to Ecuadorian plaintiffs against the manufacturers and distributors of DBCP and that he cannot understand the position taken by plaintiffs' affiants concerning the existence and effect of an extra-contractual relationship between the manufacturers and the workers. Professor Litvinoff appends an English translation of Article 2256 as part of Exhibit B to his affidavit. That provision reads, in its entirety:

> As a general rule, all damages that may be imputed to the malice or negligence of another person must be repaired by the latter.
>
> The following are particularly liable to such reparation:
>
> 1. One that provokes explosions or combustion in an imprudent manner.

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[86] *Id.* at ¶ 9. Professor Wray hedges this statement by noting that negligence actions are rarely pursued in Ecuadorian courts.

[87] Litvinoff Affidavit, ¶ 13.

> 2. One that imprudently fires a firearm.
>
> 3. One that removes slabs from a ditch or sewer pipes in a street or road, without taking the necessary precautions so that those in transit thereon by day or night do not fall.
>
> 4. One that, obligated to the construction or repair of an aqueduct or bridge that goes across a road, has it in a state of causing damage to those that travel upon it; and
>
> 5. One that manufactures and places in circulation products, objects, or artifacts, which, as a result of defects of elaboration or construction, cause accidents, shall be liable for the ensuing damages.

In a reply affidavit Professor Wray acknowledges this statute but attempts to limit its applicability by noting that

> The Supreme Court [of Ecuador] has held that this rule applies to a party selling a product intended as poultry feed if the consumption of said product causes the death of said poultry (Gaceta Judicial, Series XV, No. 3, p. 567). This application is relevant by virtue of the fact that there is a direct legal link between the manufacturer/dealer and the buyer who suffered the damages, but the parties who suffered in this case bought nothing.[88]

In light of the plain meaning of Article 2256(5) the court is unwilling to infer from a single case holding a manufacturer liable to the immediate purchaser of a product a rule that a manufacturer cannot be liable to

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[88] Reply Wray Affidavit, ¶ 2.

anyone other than the immediate purchaser. The court is also reluctant to adopt Professor Wray's attempt to explain why the more general tort action provided by Article 2241 would not be available to plaintiffs. Professor Wray offers no proof beyond his own conclusory statement why the existence of an intermediate purchaser would preclude plaintiffs from pursuing an action to enforce the extra-contractual duty not to negligently or tortiously injure other persons imposed upon defendants by Article 2241. The court concludes that defendants have satisfied their burden to demonstrate that plaintiffs will not be deprived of all remedies in the courts of Ecuador.[89]

v. Guatemala

Defendants submit the declarations of Ricardo Sagastume Vidaurre, former Chief Justice of the Supreme Court of Justice of Guatemala. Mr. Vidaurre states that Article 1646 of the Civil Code provides a tort cause of action by which plaintiffs could recover damages from defendants for the injuries they suffered. He also states that by creating a rebuttable presumption of fault, Article 1648 places the burden to prove lack of fault on the defendants. Mr. Vidaurre also states that injured workers may pursue an action against their employers under the Labor Code and that Article 326 of the Labor Code provides a mechanism for joining the manufacturer of a

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[89] Although plaintiffs' affiants also allude to difficulties that plaintiffs may encounter because of the class distinctions prevalent in Ecuador, they have not established that they would be treated unfairly by the courts of Ecuador.

harmful chemical because it enables plaintiffs to utilize the third-party practice provisions of the Code of Civil and Commercial Procedure. While plaintiffs' affiants on Guatemalan law question the accuracy of Mr. Vidaurre's statements concerning the Labor Code, they do not question that plaintiffs may pursue relief from their employers under the Civil Code.[90] Accordingly, the court concludes that plaintiffs will not be treated unfairly or deprived of all remedies in the courts of Guatemala.

vi. Honduras

Defendants submit the affidavits of Professor Enrique Ortez Colindres. Professor Colindres states that Article 2236 of the Civil Code provides a tort cause of action

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[90] Affidavit of Francisco Villagran Kramer, former Vice President of the Republic of Guatemala, ¶ 7 ("[I]n spite of the fact that the labor law penalizes employers that cause injury, workers must go through the civil courts to claim compensation for damages. . . . "). Plaintiffs also submit the affidavit of Jose Luis Gonzalez Dubon, produced by one or more of the defendants at an earlier stage of this litigation, in which Mr. Dubon contradicted both plaintiffs' and defendants' more recent affiants when he opined that "if the employees of a company are affected by any product that is not manufactured or made by the same company for which they work, they cannot claim or demand against the party that made, produced or manufactured the product which affected them." In the same affidavit, however, Mr. Dubon also opined that "[t]he first recourse of said employees is the Instituto Guatemalteco de Seguridad Social. . . . If the employer is not registered in said Institute, the employee may claim his indemnity for damages directly from his employer; as in accordance with Articles 1649 and 1650 of Guatemala's Civil Code. . . . "

through which plaintiffs could pursue an action to recover damages from defendants for the injuries they suffered. He also states that injured workers may seek compensation from their employers under the Labor Code or from the Honduran Social Security Institute, a workers' compensation program administered by the government. Plaintiffs counter with the affidavits of Enrique Flores Valeriano, a former judge of the Supreme Court of Justice, and Rene Velasquez Diaz, the General Director of the Attorney General's Office of the Department of Justice. Mr. Diaz states that plaintiffs' claims could only be brought in the labor courts, and, because there is no express provision in the Labor Code setting the amount of damages for the injury of sterility, plaintiffs cannot obtain any relief. While Mr. Valeriano agrees that plaintiffs could only proceed in the labor courts, he does not agree that all recovery is foreclosed because "in instances of professional risk where a worker incurs an injury whose compensation is not given in [the disability compensation] table . . . the amount of compensation, according to the law, is to be set by a competent authority, based on testimony from three (3) Government doctors, at no cost whatever to the parties."[91] Because one of plaintiffs' affiants agrees that some measure of compensatory redress for their injuries is available in Honduras, the court concludes that plaintiffs will not be deprived of all remedies in the courts of Honduras and that plaintiffs would not be treated unfairly by the courts of Honduras.

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[91] Valeriano Affidavit, ¶ 4.

vii. Ivory Coast

Defendants submit the affidavits of Professor Jacqueline Lohoues-Oble, former Minister of Justice and Custodian of the Seals of the Republic of Cote d'Ivoire. In her original affidavit Professor Lohoues-Oble states that "[i]n summary, articles 1382, 1383 and 1384 [of the Civil Code] collectively establish a judicial remedy that allows a party who has suffered an injury to be able to claim from all courts the corresponding compensation derived from same, whether or not the company in question is foreign or Ivorian."[92] In her supplemental affidavit Professor Lohoues-Oble states that "[p]laintiffs would have a remedy for any claim based on infertility. In effect infertility is classified as an injury to an individual's ability to enjoy the pleasure of life, for example the loss of marital enjoyment."[93] Plaintiffs' affiants on the law of the Ivory Coast do not question the accuracy of these statements. However, the affidavit of Christophe Kouakou raises a similar question identified by plaintiffs' affiant on the law of Burkina Faso; since many of the workers migrate from plantation to plantation, they may not be able to establish the specific place of injury. Because dismissal will be conditioned on defendants' waiver of jurisdictional defenses, the court concludes that plaintiffs who can meet the jurisdictional requirements of the courts of the Ivory Coast will not be treated unfairly or deprived of all remedies.

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[92] Lohoues-Oble Affidavit, ¶ 15.

[93] Supplemental Lohoues-Oble Affidavit, ¶ 7.

viii. Nicaragua

Defendants submit the affidavits of Dr. Raul Barrios Olivares, an Associate Justice[94] of the Supreme Court of Nicaragua. Dr. Olivares states that under Article 2509 of the Civil Code, Article 89 of the Law on Insecticides, and Articles 82 through 110 of the Labor Code "an individual plaintiff in Nicaragua may bring an action in the appropriate judicial forum for personal injuries such as those alleged by the plaintiffs. . . . "[95] Though several of plaintiffs' affiants take issue with Dr. Olivares' interpretation of the relevant provisions of the Labor Code, none contradict the conclusion that plaintiffs could pursue an action under Article 2509 of the Civil Code.[96] Accordingly, the

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[94] Plaintiffs' affiants state that Dr. Olivares is only an alternate judge. Affidavit of Dr. Margarita Ramirez Tapia, former General Inspector for the Ministry of Labor, at 3; affidavit of Dr. Agustin Aleman Lacayo, a labor judge in Managua, Nicaragua, ¶ 10; supplementary affidavit of Dr. Mariano Barahona, ¶ I.

[95] Olivares Affidavit, ¶ 24.

[96] E.g., Affidavit of Professor Marco Gonzalez-Pastora, ¶ 15 ("In Nicaragua, these cases must be prosecuted under civil law instead of labor law. . . . "); Affidavit of Professor Vilma Nunez de Escorcia, former Vice Chief Justice of the Supreme Court of Justice of Nicaragua, ¶ 3 ("In theory, the workers could bring suit in the civil courts. . . . A decision handed down by a civil court would be based on Article 2509 of the Civil Code."); Lacayo Affidavit, ¶ 3 ("[T]he right exists to claim compensation for damages in Nicaragua . . . under Article 2509 of the Civil Code. . . . "); Affidavit of Professor Rodolfo Sandino Arguello, ¶ 2.1 ("There is a general right under which a suit for damages could be brought, i.e., the 1904 Civil Code, which is still in effect.").

court concludes that plaintiffs will not be treated unfairly or deprived of all remedies in the courts of Nicaragua.

ix. Panama

Defendants submit the affidavits of Dr. Jorge Fabrega, an Alternate Justice of the Supreme Court of Panama. Dr. Fabrega states that "[p]ursuant to tort theories under [Articles 1644 and 1652a of] the Civil Code and [Articles 284 and 302 of the] Labor Code, an individual plaintiff in Panama may bring an action in the appropriate judicial forum for personal injuries such as those alleged by the plaintiffs. . . . "[97] While plaintiffs' affiants state that the Labor Code does not provide an avenue of relief for loss of reproductive capacity, they admit that plaintiffs could pursue actions under Article 1644 of the Civil Code. Accordingly, the court concludes that plaintiffs will not be treated unfairly or deprived of all remedies in the courts of Panama.

x. The Philippines

Defendants submit the affidavits of Jose F.S. Bengzon, Jr., a former president of the Philippine Bar Association. Mr. Bengzon concludes that "[p]ursuant to both contractual and tort theories of the Civil Code, an individual plaintiff in the Phillipines may bring an action in the appropriate judicial forum for personal injuries

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[97] Fabrega Affidavit, ¶ 20.

such as those alleged by the plaintiffs. . . . "[98] Plaintiffs and their affiants disagree.

Plaintiffs submit Opinion No. 52, S. 1995, issued by Demetrio G. Demetria, Acting Secretary of the Department of Justice of the Republic of the Phillipines in his capacity as the Attorney General. Plaintiffs argue that this opinion is conclusive as to the scope and effect of the law of the Phillipines.[99] While defendants question plaintiffs' argument they submit no evidence and cite no authority to the contrary.[100] Accordingly, the court accepts the

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[98] Bengzon Affidavit, ¶ 16.

[99] *See United States v. Pink*, 315 U.S. 203, 219, 62 S.Ct. 552, 560, 86 L.Ed. 796 (1942) (official declaration of the Commissariat for Justice of the Union of Soviet Socialist Republics concerning the extraterritorial effect of an earlier decree nationalizing the insurance industry was conclusive); *D'Angelo v. Petroleos Mexicanos*, 422 F.Supp. 1280, 1284-85 (D.Del.1976), aff'd without opinion, 564 F.2d 89 (3d Cir.1977), cert. denied, 434 U.S. 1035, 98 S.Ct. 770, 54 L.Ed.2d 783 (1978) (Attorney General opinion concerning effect of expropriation decree nationalizing petroleum resources held conclusive where evidence demonstrated that "in the absence of an adjudication by a Mexican court . . . [the Attorney General] is not only the proper authority, but the highest and sole authority empowered to issue official legal opinions in response to a proper request.").

[100] The Attorney General, in Opinion No. 52, S. 1995, states that "pursuant to law and precedent, the Secretary of Justice, as Attorney General, does not render opinion except for national government functionaries . . . and then only on cases, controversies or matters actually arising in the performance of their functions and duties." Nevertheless, he issued Opinion No. 52, S. 1995 "pursuant to the doctrine of parens patria[e]." Absent contrary authority in published judicial opinions the statements of the Attorney General in Opinion No. 52, S. 1995, must be treated as conclusive.

Attorney General's statement that plaintiffs cannot pursue an action in contract against defendants pursuant to Article 1546 of the Civil Code because no contractual privity exists between plaintiffs and defendants. The court also accepts the Attorney General's statement that plaintiffs cannot pursue a strict products liability action against the manufacturer defendants pursuant to Article 2187 of the Civil Code because DBCP is not within the scope of items, such as "foodstuffs, drinks, toilet articles, and similar goods" covered by that provision. Moreover, the court accepts the Attorney General's statement that plaintiffs could not pursue recovery based upon theories relating to certain intentional torts recognized in common law countries pursuant to Article 2176. Notwithstanding all of these statements, Opinion No. 52, S. 1995, does not support the ultimate conclusion that plaintiffs would be deprived of all remedies in the Philippines because the opinion fails to address whether plaintiffs could pursue a remedy under a worker's compensation scheme or whether plaintiffs might have a viable action in negligence under Article 2176 or some other Code provision.

The remainder of plaintiffs' affiants on Philippine law attempt to fill in these gaps. Professor Perfecto V. Fernandez states that "[p]laintiff banana workers would be limited to remedies under the Labor Code of the Philippines or the Civil Code of the Philippines, for recovery of compensation or damages for injuries sustained."[101] With respect to claims under the Labor Code Professor Fernandez clarifies that the Labor Code was

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[101] Fernandez Affidavit, ¶ 11.

enacted in 1974 to replace the former Workmen's Compensation Act scheme involving private insurance with a government agency against which all claims seeking recovery from an employer for work related injuries are made.[102] After explaining that recovery under either the old or the new scheme[103] is restricted to injuries that inhibit a worker's ability to work[104] he concludes that "claims of the workers for employee compensation [based on infertility] would be denied, simply because they have not suffered any resultant disability resulting from their exposure to toxic substances used in the course of their work."[105] Plaintiffs' other affiants generally agree that plaintiffs could not successfully prosecute a claim for disability under either the old worker's compensation law or the new Labor Code.

Plaintiffs urge the court to conclude that because they would be unable to successfully recover claims for disability compensation under either the old Workmen's Compensation Act or the new Labor Code they will be

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[102] *Id.* at ¶¶ 12-14.

[103] In *Landicho v. WCC & Canlubang Sugar Estate*, 89 SCRA 147, 154 (1979), the Supreme Court of the Philippines applied the old worker's compensation law to a claim that arose from actions that occurred prior to passage of the new Labor Code. Because plaintiffs' claims arise from events that occurred both before and after passage of the new Labor Code the court must examine Professor Fernandez' statements under both regimes.

[104] *See Lombo v. Standard Cigarette Mfg. Co.*, 58 SCRA 750, 759 (1974) (explaining that only injuries inhibiting a worker's capacity to work are compensable under the old Workmen's Compensation Act).

[105] Fernandez Affidavit, ¶ 17.

deprived of all remedies. However, this argument must be viewed in light of the additional information contained in Professor Fernandez's two affidavits. Before the new Labor Code was enacted a person suffering a work related injury through the tortious conduct of a third-party (i.e., not his employer) was faced with an election of remedies. If the worker wished to proceed against his employer for disability, section 5 of the Workmen's Compensation Act[106] made the right of action provided by section 2 of that Act his exclusive initial remedy, and he could only proceed before the Workmen's Compensation Commission. *Robles v. Yap Wing*, 41 SCRA 267, 270-75 (1971) (upholding dismissal from regular courts of a claim for compensable disability damages against only the employer pursuant to Article 1711 of the Civil Code). Once a worker accepted compensation the employer became subrogated to the worker's right to proceed against any third-party tortfeasors, but the employer remained obligated to turn over to the worker all amounts recovered in excess of the compensation paid. *Esguerra v. Munoz Palma*, 104 Phil. 582, 586 (1958). However, if the worker's claim for compensation was denied or if, pursuant to section 6 of the Act, he elected to forego any claim for compensation, he could proceed directly

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[106] Section 5, entitled "Exclusive right to compensation" provided, in pertinent part, that "The rights and remedies granted by this Act to an employee by reason of a personal injury entitling him to compensation shall exclude all other rights and remedies . . . against the employer . . . because of said injury."

against the third-party tortfeasor in the regular courts.[107] Finally, a worker who joined a disability claim with other, non-disability related, claims against the employer could proceed immediately in the regular courts under Article 1711. *Pacana v. Cebu Autobus Co.*, 32 SCRA 442, 448-50 (1970). Professor Fernandez' reply affidavit reveals that, with the exception of the substitution of the State Insurance Fund for the employer's worker's compensation insurance carrier, the situation is remarkably similar under the new Labor Code.[108]

The court is persuaded that the law of the Philippines provides plaintiffs with either a right to seek compensation under the applicable benefits regime or a right of

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[107] *Esquerra v. Munoz Palma* at 585-86 ("[T]he injured laborer was initially free to choose either to recover from the employer the fixed amounts set by the Compensation Law or else, to prosecute an ordinary civil action against the tortfeasor for higher damages. . . . Having staked his fortunes on a particular remedy, [the worker] is precluded from pursuing the alternate course, at least until the prior claim is rejected by the Compensation Commission."). Accord, *Robles v. Yap Wing*, 41 SCRA at 273 ("[S]ection 6 [of the Workmen's Compensation Act] . . . gives the injured employee the option to claim compensation benefits against his employer under the Act or to sue the third person who caused the injury for damages in the regular courts.").

[108] Fernandez' Reply Affidavit, ¶ VIII(3) ("[I]n a situation where a third party's acts has brought about the work-connected or work-related injury, a claim for damages may be pursued against such third-party. However, upon payment of employee compensation by the [State Insurance Fund] System, the latter is subrogated to the claim of the worker, and the System may prosecute the claim for damages against the third party, with any excess of recovery going [to the] worker pursuant to Art. 174 of the Labor Code.").

action against any third-party tortfeasor who caused their injuries. The court is not persuaded that plaintiffs would be foreclosed from pursuing a direct action against their employers in the event that their injuries are not compensable under either the old Workmen's Compensation Act or the new Labor Code. In *Robles v. Yap Wing* the Supreme Court of the Philippines stated that

> Our Workmen's Compensation Act is patterned after the statutes of Hawaii, New York, and Minnesota. American decisions and authorities are therefore relevant in the interpretation of our local law on the subject, thus:
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> "The compensation remedy is exclusive of all other remedies for the same injury, if the injury falls within the coverage formula of the act. If it does not, as in the case where occupational diseases are deemed omitted because not within the concept of accidental injury, the compensation act does not disturb any existing remedy. . . . "

41 SCRA at 273-74. The court therefore concludes that plaintiffs will not be deprived of all remedies in the courts of the Philippines.

xi. Saint Lucia

Defendants submit the affidavits of Winston F. Cenac, President of the Saint Lucia Bar Association and former Attorney General of Saint Lucia, Saint Vincent, and Grenada. Mr. Cenac states that "[p]laintiffs would have a remedy for any claim based on infertility pursuant to the English Common Law and Article 917A of the Civil Code

provides a remedy to the end user of manufactured products where the manufacturer is negligent."[109] While plaintiffs' affiant, Leonard Joseph Riviere, former Attorney General and Minister of Legal Affairs of Saint Lucia, states that the Pesticide Control Act of 1975 would not govern plaintiffs' actions, he does not challenge Mr. Cenac's conclusions. Accordingly, the court concludes that plaintiffs will not be treated unfairly or deprived of all remedies in the courts of Saint Lucia.

xii. Saint Vincent

Defendants submit the affidavits of Adrian D. Saunders, former Secretary of the Saint Vincent Bar Association. Mr. Saunders states that "Saint Vincent subscribes to and faithfully applies the English common law" and concludes that "[p]ursuant to . . . tort theories based upon English common law applicable in Saint Vincent an individual Plaintiff in this country may bring an action in the appropriate judicial forum for personal injuries such as those alleged by the Plaintiffs. . . . "[110] While plaintiffs' affiant, Robert Andrew Cummings, counsel to the Saint Vincent Banana Growers Association, states that the Pesticide Control Act, Chapter 42 of the Laws of Saint Vincent, 1990, would not govern plaintiffs' actions, he does not challenge Mr. Saunders' conclusions. Accordingly, the court concludes that plaintiffs will not be treated unfairly or deprived of all remedies in the courts of Saint Vincent.

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[109] Supplemental Cenac Affidavit, ¶ 6.

[110] Saunders Affidavit, ¶¶ 9, 16.

c. Conclusion

Because defendants have indicated their willingness to condition dismissal upon waiver of all jurisdictional and limitations defenses by all defendants and third-party defendants, and because dismissal will also be conditioned upon acceptance of jurisdiction over these actions by the courts in each country, the court concludes that defendants have met their burden to establish the existence of at least one alternative forum for plaintiffs from each country. A careful review of the materials submitted by the parties convinces the court that each alternative forum is an adequate forum.

3. Private interest factors

Once a court has concluded that a "foreign forum is both available and adequate, it should then consider all of the relevant factors of private interest, weighing in the balance the relevant deference given the particular plaintiff's initial choice of forum." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d at 1165.

a. The relevant deference

> While district courts ordinarily should respect an American plaintiff's forum choice, a foreign plaintiff's choice of an American forum merits less deference. . . .
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> * * *
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> Convenience is the ultimate consideration for a district court in balancing the private interest

> factors, including the forum choice of the plaintiff. When a plaintiff chooses a foreign forum for its claims, courts are reluctant to assume that convenience motivated that choice.

Empresa Lineas Maritimas Argentinas, S.A. v. Schichau-Unterweser, A.G., 955 F.2d 368, 373 (5th Cir.1992). Although a few plaintiffs now reside in the United States, all are citizens of foreign countries, all claim that their injuries arose from exposure to DBCP in foreign countries, and all invoke the jurisdiction of the courts of Texas pursuant to Tex.Civ.Prac. & Rem.Code Ann. § 71.031. Accordingly, all plaintiffs' forum choices merit only the deference accorded to foreign plaintiffs. Plaintiffs, relying on *Blanco v. Banco Industrial de Venezuela, S.A.*, 997 F.2d 974, 981 (2d Cir.1993) (affording Venezuelan plaintiff's forum choice deference usually reserved for citizens of the United States because a treaty of friendship, commerce, and navigation exists between the two countries), urge the court to afford their forum choice the same deference as that afforded to citizens of the United States. Although plaintiffs do not cite and the court has not found any similar authority in the Fifth Circuit, the court will nevertheless review defendants' motion under the higher standard that requires defendants to overcome the presumption accorded the plaintiffs' chosen forum by proving that the balance of interests points clearly toward trial in the alternative forum. *Piper Aircraft Co. v. Reyno*, 454 U.S. at 253-57, 102 S.Ct. at 265-66.

b. Balancing the interests

> In determining whether a particular forum is appropriate, the court is required to balance the

> private interests of the litigants. . . . The private interests to be considered include: (i) relative ease of access to sources of proof; (ii) availability of compulsory process for attendance of unwilling and the costs of obtaining attendance of willing, witnesses; (iii) possibility of view of premises, if a view would be appropriate to the action; (iv) all other practical problems that make trial of a case easy, expeditious and inexpensive; and (v) enforceability of a judgment if one is obtained.

Gonzalez v. Naviera Neptuno A.A., 832 F.2d 876, 878 (5th Cir.1987). "While reviewing these private interest factors, the court should also consider [vi] whether the defendant's motion to dismiss was filed in a timely manner," *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d at 836, and "should review the motion in light of the status of the case at the time the motion is filed." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d at 1166. When balancing the private interest factors a district court must not give conclusive weight to any one factor. *Empresa Lineas Maritimas v. Schichau-Unterweser, A.G.*, 955 F.2d at 376.

i. Relative ease of access to sources of proof

Plaintiffs do not allege that defendants' products were defectively manufactured or designed. They allege that the products were defectively marketed because defendants continued manufacturing, selling, distributing, and using DBCP after they knew that it could cause the injuries the plaintiffs ultimately suffered. Toxic tort

cases concerning defective marketing are intensely fact specific. The key issues are (1) whether plaintiffs were exposed to a particular defendants' product, (2) whether plaintiffs were actually injured and, if so, whether the product caused the injury, (3) whether defendants violated a duty by failing to provide adequate warnings or by marketing a product so unreasonably dangerous that it should never have been marketed, and (4) whether plaintiffs' own conduct provides a defense to a defendant's liability for their injuries.

As pointed out by defendants' affiant, R. Burton Ballanfant, to properly investigate these matters entails a need to question not only the plaintiffs, but also their coworkers, family members, neighbors, supervisors, doctors, and employers. Defendants may also need to inspect numerous documents, including plaintiffs' employment records, to construct an accurate picture of each plaintiff's level of exposure to DBCP, and plaintiffs' medical and personnel records to uncover other potential causes of infertility, such as alcoholism, drug abuse, venereal disease, psychological difficulties, and familial or congenital conditions.

With the exception of a few plaintiffs who now reside in the United States, all of these many thousand sources of proof can only be found in the various countries in which plaintiffs are citizens or in which they worked. In recognition of the difficulty defendants would encounter accessing these widely scattered sources of proof from litigation conducted in Houston, plaintiffs offer to alleviate the onerousness of defendants' information gathering burden. Each plaintiff promises to appear in Houston at

his own expense and to submit to deposition and examination by defendants' medical or other experts. Each plaintiff also offers to bring at least two co-workers, and all medical staff necessary to prove the extent of his injury or to reimburse defendants' travel expenses to obtain access to this information. Performance of these promises is guaranteed by each plaintiff's additional promise to accept dismissal of his case with prejudice if he fails to perform.

While these stipulations satisfy many of defendants' concerns, they do not provide a realistic alternative to proceedings in plaintiffs' home countries. Plaintiffs' stipulations do not satisfy defendants' need to obtain access to information in the possession of non-parties such as plaintiffs' family members, neighbors, supervisors, and former or current employers. Nor do the stipulations address whether a plaintiff should suffer the penalty of dismissal if, through no fault of his own, he is unable to compel production of information from these sources in Houston.

Plaintiffs argue that the evidence concerning the manufacturing defendants' knowledge of DBCP's dangerous characteristics, their decisions to continue marketing DBCP notwithstanding this knowledge, and documentary proof of distribution will be found only in the United States and that access to that information will be unavailable through the discovery process if these cases are dismissed. Although plaintiffs argue that the world headquarters of two defendants, Shell and Occidental, are located in Houston, and Dallas, Texas, they do not identify any specific group of persons located in Texas who possess either large amounts of information or

particularly critical pieces of information who could not be subjected to compulsory appearance in plaintiffs' home countries as employees of a party defendant.

The court concludes that the overwhelming majority of the relevant sources of proof are more readily available to the parties in the home countries of the plaintiffs and that this factor weighs heavily in favor of dismissal. Nevertheless, because foreign fora might not afford plaintiffs as many opportunities for discovery as they desire, to ensure that plaintiffs have access to evidence located in the United States no case will be dismissed until 90 days have elapsed after the entry of this Memorandum and Order. During that time plaintiffs may pursue expedited discovery against defendants under the supervision of this court. The court will also condition dismissal on the stipulation by defendants (and third-party and fourth-party defendants) that all discovery conducted during the pendency of these actions (and in *Rodriguez* and *Erazo* prior to remand) may be used in any foreign proceeding.

ii. Availability of compulsory process for attendance of unwilling witnesses and the costs of obtaining attendance of willing witnesses

The overwhelming majority of fact witnesses reside in the home countries of the plaintiffs. With the exception of named plaintiffs, none of these witnesses are subject to the subpoena power of this court. Moreover, since defendants have expressed an interest in impleading at least some of these fact witnesses, including some of plaintiffs'

employers and supervisors, the unavailability of compulsory process may result in more than just inconvenience. Although plaintiffs argue that their stipulation should mitigate the effect of this factor, neither plaintiffs nor defendants could compel unwilling witness to appear in Houston as a result of the stipulation.

Transportation costs to bring willing witnesses from around the world to Houston will be very high. Although this factor is affected somewhat by plaintiffs' stipulation, plaintiffs have not agreed to help defray the costs necessary to secure attendance of defendants' own foreign witnesses. Moreover, the court cannot ignore that the overall economic cost will be greater if plaintiffs and their witnesses travel to Houston than if defendants' representatives and their documents are transported to plaintiffs' home countries. The court concludes that this factor weighs heavily in favor of dismissal.

iii. Possibility of view of premises

Although defendants state in their f.n.c. motion that a view of the banana plantations "likely will be required to investigate [p]laintiffs' allegations with respect to the conditions of exposure to DBCP and application techniques," neither party has produced any evidence that a view of the banana plantations or of any other location or site would be relevant or helpful to the trier of fact. Accordingly, the court finds that this factor should not be afforded any weight in the balancing of interests.

iv. Other practical problems that make trial of a case easy, expeditious, and inexpensive

Plaintiffs argue that trial of these actions in this court will be much less costly and will proceed much faster than trials in the plaintiffs' home countries. In particular, plaintiffs argue that no other single forum can handle all of these actions as a unitary whole. Plaintiffs also argue that because class actions are unavailable in many of their home countries and because joinder of large numbers of actions is not customary in these countries, they will be forced to commence thousands of individual actions in hundreds of courts that are understaffed, back-logged, and ill-equipped to handle the sheer number and complexity of these cases in a timely, efficient manner. Plaintiffs also argue that the availability of interlocutory appeals and other procedural differences between case management techniques practiced in this court and those practiced in the courts of their home countries will result in avoidable, unnecessary delay in resolving their cases. Finally, plaintiffs argue that because contingent fee arrangements to cover attorney's fees are either illegal or unethical in many of these countries and because bonds covering court costs are often required, plaintiffs' initial expenses will be much greater in their home countries than in this court.

Defendants respond that while plaintiffs have sought class certification in several of the pending actions, no classes have been certified. Defendants also note that even if classes are certified, these cases will take years to try because each plaintiff will still have to present individual proof of exposure, injury, and causation. The court

agrees. There are more than 16,000 individual plaintiffs in these consolidated actions. More than 14,000 of these plaintiffs will remain after *Rodriguez* (approximately 1500 plaintiffs) and *Erazo* (a single plaintiff) are remanded to state court. Even assuming that the undersigned judge were allowed to cede responsibility for the remainder of his docket and to devote undivided attention to trial of this action, it would take more than a decade to hear the causation and damage issues alone.[111]

As to the relative expense, the court must consider that because much of the testimony and many of the documents in these actions will be presented to the court in the languages of the plaintiffs' home countries, a variety of interpreters will be required. As to the availability of contingent fee arrangements and bonding requirements, the court observes that most of plaintiffs' home countries employ fee shifting devices under which the losing party is responsible to reimburse the winner for all of the court costs and attorney's fees paid. In most of the countries an indigent plaintiff can also obtain free counsel.

The parties have identified a variety of countervailing considerations as to which forum would be more efficient and less expensive. Because continued proceedings in this forum would yield the added efficiency of consolidating all further pretrial motions before one

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[111] For example, even with efficient case management techniques and simultaneous translation of testimony of foreign witnesses it is doubtful that the court could hear the evidence concerning more than two plaintiffs per day, or 500 plaintiffs per year, assuming 250 trial days per year.

judge who is already familiar with the issues in the case, the court concludes that, on balance, this factor weighs slightly against dismissal.

v. Will a foreign judgment be enforceable?

Defendants have expressed willingness to condition dismissal of these actions on an agreement to establish a mechanism guaranteeing satisfaction of any judgment in the home countries of plaintiffs. Such an agreement would result in no effective difference between a judgment rendered in a foreign court and one rendered in the United States. Since such an agreement would place this factor in equipoise it will be afforded no weight in the balancing of interests.

vi. Was defendant's motion to dismiss filed in a timely manner?

Plaintiffs argue that defendants' f.n.c. motion was not filed in a timely manner because these cases were pending in state court for a lengthy period before removal and were pending in federal courts for a lengthy period before defendants filed their motions to dismiss. Ordinarily, "untimeliness . . . should weigh heavily against the granting of the motion [to dismiss for f.n.c.] because a defendant's dilatoriness promotes and allows the very incurrence of costs and inconveniences the doctrine is meant to relieve." *In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d at 1165. This is not the ordinary case, however.

Because plaintiffs filed these actions in Texas courts before September 1, 1993, the Texas Supreme Court's decision in *Dow Chemical Co. v. Alfaro*, 786 S.W.2d at 679, precluded defendants from obtaining an f.n.c. dismissal as long as the actions remained in state court. Moreover, shortly after the actions were removed to federal court plaintiffs sought[112] and obtained an order[113] delaying consideration of any motion to dismiss for f.n.c. until after plaintiffs' motions to remand and to dismiss for lack of subject matter jurisdiction had been resolved. The court then circulated[114] and established a schedule for addressing dispositive motions, including motions to dismiss for f.n.c.[115] Since this Memorandum and Order simultaneously considers the merits of plaintiffs' motions to remand and to dismiss for lack of subject matter jurisdiction and defendants' motions to dismiss for f.n.c., the court is convinced that any delay between commencement of the actions and consideration of the motions to dismiss was not attributable to dilatoriness by defendants. Because defendants were not dilatory, and because little discovery into the merits of plaintiffs' actions has taken place, the court concludes that delay should not be afforded appreciable weight in the balancing of interests.

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[112] Docket Entry No. 33 in H-94-1337.

[113] Docket Entry No. 54 in H-94-1337.

[114] Docket Entry No. 188 in H-94-1337.

[115] Transcript of Hearing Proceedings, Docket Entry No. 261 in H-94-1337, at 21-27.

c. Conclusion

When viewed as a whole the private interests weigh strongly in favor of dismissing these actions under the doctrine of forum non conveniens. Defendants have persuaded the court that the overwhelming majority of the evidence can only be made readily available in plaintiffs' home countries. Although plaintiffs have demonstrated a need to discover evidence in the United States, the court is persuaded that plaintiffs will have adequate access to such evidence if dismissal is postponed for 90 days. Defendants have also satisfied the court that, on balance, their concern about access to the sources of proof outweighs the modest efficiency to be gained from continued litigation in this court. Defendants have therefore overcome the presumption favoring plaintiffs' forum choice by demonstrating that the balance of interests clearly point in favor of prosecuting these actions in plaintiffs' home countries.

4. Public interest factors

If a district court concludes that an adequate alternative forum is available and that the balance of private interest factors strongly favors dismissal, it "ha[s] no need to consider the public interest factors." *Empresa Lineas Maritimas v. Schichau-Unterweser, A.G.*, 955 F.2d at 376. Nevertheless, for the sake of completeness (having already surrendered any hope of achieving brevity),[116] the court will also examine the public interest factors.

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[116] The court has allowed the parties extraordinary leeway in submitting numerous briefs and other written materials in

a. Balancing the interests

In *Piper Aircraft Co. v. Reyno*, the Supreme Court synthesized the most relevant public interest factors enumerated in *Gulf Oil Corp. v. Gilbert*.

> The public factors bearing on the question included the administrative difficulties flowing from court congestion; the "local interest in having localized controversies decided at home"; the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.

454 U.S. at 241 n. 6, 102 S.Ct. at 258 n. 6.

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connection with the pending motions. As the length of this Memorandum and Order indicates, the court has expended considerable time reading these papers and performing a significant amount of independent research to be as fully informed as possible when addressing the parties' arguments. While, because of the sheer volume of information presented, it is not impossible that some arguments were overlooked, the parties should assume that failure to expressly address a particular argument in this Memorandum and Order reflects the court's judgment that the argument lacked sufficient merit to warrant discussion. Accordingly, the court strongly discourages the parties from seeking reconsideration based on arguments they have previously raised or that they could have raised.

i. Localized controversies

This controversy involves thousands of plaintiffs who allege injuries resulting from exposure in 23 foreign countries to DBCP that was manufactured in several states of the United States and in Israel. The controversy is not "localized" in the Southern District of Texas (or in any other location in Texas) under any meaning of the word "local." Aside from the fact that many years after plaintiffs' exposure to DBCP ended two plaintiffs in Valdez moved to Texas[117] and that two defendants moved their headquarters to Texas, plaintiffs have produced no evidence that any defendant took any action in Texas that affected whether plaintiffs would be exposed to DBCP. The dearth of evidence linking plaintiffs' claims to Texas weighs heavily in favor of dismissal. *See* Syndicate 420 at *Lloyd's London v. Early American Ins. Co.*, 796 F.2d at 831-32 (affirming dismissal for f.n.c.).

ii. Interest in having diversity cases tried by a court that is "at home" with the law that must govern the action

The parties devote considerable briefing to whether the local law of each country will apply to plaintiffs' actions, or whether they will be governed by "American law," the law of a state of the United States, or even, as plaintiffs' most recent papers suggest, whether different laws will govern different aspects of plaintiffs' claims.

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[117] In light of the court's remand order in *Rodriguez*, the Texas resident in that case will have access to a Texas court.

The court need not decide what law will apply because the court is convinced that the two bodies of law with which this court is "at home," Texas law and federal law, will not apply.[118] However, because both federal law and Texas law share a common-law tradition with most of the other states of the United States, and because many of plaintiffs' home countries share a civil law tradition, the court is perhaps slightly better acquainted with the other domestic laws that might govern some aspect of plaintiffs' actions than are the courts of the plaintiffs' home countries. Accordingly, because the choice of law questions raised by the parties are not yet resolved, the court attributes little weight to this factor.

iii. The avoidance of unnecessary problems in conflict of laws or in the application of foreign law

As intimated in the preceding section, these cases present multiple and complex questions about which law to apply to different aspects of plaintiffs' claims. If the choice of law analysis ultimately points to application of the laws of plaintiffs' home countries to plaintiffs' claims, a trial in this court would require a jury to consider at least twelve different legal standards and to quantify

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[118] Of the many potential bodies of substantive law that might apply to these cases, Texas is the least likely to govern resolution of any aspect of plaintiffs' cases. Not a single plaintiff alleges that he was injured by exposure to DBCP in Texas. Not a single plaintiff alleges that the DBCP that injured him was manufactured in, sold in, distributed from, or in any other relevant respect associated with the state of Texas.

damages according to at least twelve different measures. As complicated as that scenario may be, it pales in comparison to the possibility that a jury may be asked to apply the laws of several states of the United States with respect to the conduct of some defendants in some countries for some of the relevant time frame and to apply the laws of some of plaintiffs' home countries to other conduct of other defendants for other relevant periods. Although proceedings in each of plaintiffs' home countries cannot entirely avoid the question of which law to apply to each defendant, the menu of potential choices available to a court in any of plaintiffs' home countries will invariably be much shorter due to the elimination of foreign laws based on the nationalities of plaintiffs from other foreign countries and of defendants who are not implicated in plaintiffs' home countries. (Not all defendants are implicated in all of plaintiffs' home countries.) Accordingly, this factor weighs in favor of dismissal.

iv. The unfairness of burdening citizens in an unrelated forum with jury duty

Plaintiffs have repeatedly reminded the court that a judge, as opposed to a jury of lay persons, would decide contested issues of fact if these cases were tried in most of their home countries. If the cases remain in Texas plaintiffs seek jury trials. When citizens of the United States serve as jurors they are compelled to forsake their chosen occupations for the duration of the trial. Given the projected duration of a trial of these actions, this court would be forced to conscript a sufficient number of local residents to literally undertake careers as jurors. In light of

the tenuous connection between the Southern District of Texas and the subject matter of these lawsuits, the court concludes that this factor weighs heavily in favor of dismissal.[119]

b. Conclusion

Defendants have demonstrated that there is no significant connection between the substance of plaintiffs' complaints and this forum. The lack of a substantial connection to this forum persuades the court that continued proceedings here would not result in application of a body of substantive law with which this court is familiar. Moreover, if these actions were heard in the courts of plaintiffs' home countries, each action would raise substantially fewer and far less complex questions implicating the choice of laws. Finally, the court concludes that the length and complexity of plaintiffs' actions, when coupled with the lack of a substantial connection to this forum, would result in an unfair burden upon local residents forced to serve as jurors.

V. Conclusion and Order

A. Issues Concerning the Propriety of Removal

1. FSIA jurisdiction

Because *Dead Sea* was a foreign sovereign when plaintiffs were allegedly exposed to its DBCP and

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[119] Although the docket of this court is crowded, so are the dockets of most courts. The court will therefore afford this factor little weight in balancing the public interests.

because there is no evidence that defendants collusively joined *Dead Sea*, the court concludes that 28 U.S.C. § 1359 is not an impediment to jurisdiction in any of the consolidated cases. Because *Dead Sea* has waived its foreign sovereign immunity and has consented to the jurisdiction of this court, its presence confers federal subject matter jurisdiction over the entire controversy.

2. Defects in removal procedure

Because *Dead Sea* removed Jorge Carcamo, Rodriguez, Erazo, and Valdez before the state courts granted defendants leave to implead *Dead Sea* as a third-party defendant, removal of these four cases was defective. Because Shell's supplemental removal notices were filed more than 30 days after it received the first paper from which the existence of any arguably removable federal question could have been ascertained, those attempted removals were untimely.

3. Remand and retention

In *M & O I* the court concluded that *Dead Sea's* removal of Delgado was properly achieved but reserved the right to reexamine the existence of subject matter jurisdiction. Because *Dead Sea* was properly impleaded in *Delgado* and because subject matter jurisdiction over that case exists, the court will not remand it. Similarly, because *Dead Sea* was properly impleaded in Isae

Carcamo, the court finds no reason to disturb Judge Radford's decision not to remand that case.[120]

Because *Dead Sea* was impleaded in *Jorge Carcamo* and *Valdez* after removal pursuant to leave of federal court granted under Fed.R.Civ.P. 14(a), *Dead Sea* now possesses a mature right to remove those actions. Accordingly, the court concludes that remand of these cases would be a futile gesture and would merely result in unnecessary expense and delay to the parties. The court therefore finds no reason to disturb Judge Radford's decision not to remand *Valdez*.[121] For similar reasons, plaintiffs' Emergency Motion to Remand Jorge Carcamo[122] is DENIED. However, because the removals of *Rodriguez* and *Erazo* were procedurally defective, plaintiffs' Motion to Remand[123] in those two cases is GRANTED. Accordingly, pursuant to 28 U.S.C. § 1447(c), *Rodriguez* is REMANDED to the 229th District Court of Jim Hogg County, Texas, and Erazo is REMANDED to the 206th District Court of Hidalgo County, Texas. The clerk is ORDERED to mail a copy of this Memorandum and Order to the District Clerks of Jim Hogg and Hidalgo Counties.

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[120] Docket Entry No. 137 in H-95-1356.

[121] *Id.*

[122] Docket Entry No. 8 in H-94-1359.

[123] Docket Entry Nos. 6 in H-94-3248 & 9 in H-94-3451.

B. Issues Concerning Dismissal of Parties and Actions

1. Forum non conveniens

a. Dismissal

The court concludes that defendants did not waive the right to assert (and are not estopped from asserting) their motions to dismiss for f.n.c. Although an adequate alternative forum exists in each country, the court concludes that these fora will only be available if defendants agree to waive all jurisdictional and certain limitations-based defenses and if the courts in those countries do not refuse to exercise jurisdiction over these actions. The court also concludes that the balance of the relevant private and public interests points clearly toward trial in the plaintiffs' home countries if plaintiffs are allowed a reasonable period within which to conduct merits discovery of defendants and others within the United States and if defendants agree to satisfy plaintiffs' concerns regarding the enforceability of judgments rendered in their home countries. Accordingly, defendants' motion to dismiss these consolidated actions (other than *Rodriguez* and *Erazo*) on the grounds of forum non conveniens[124] is conditionally GRANTED.

Delgado, Jorge Carcamo, Valdez, and Isae Carcamo will be dismissed 90 days after the entry of this Memorandum and Order provided that defendants and third- and fourth-party defendants have:

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[124] Docket Entry No. 244 in H-94-1337.

(1) participated in expedited discovery in the United States according to the following schedule. By July 21, 1995, counsel for plaintiffs (and intervenor-plaintiffs) will provide counsel for defendants (including counsel for third- and fourth-party defendants) with any additional papers seeking production of written discovery and a list of all witnesses they seek to depose during this 90-day period together with the approximate length of each deposition. By July 31, 1995, counsel for defendants and third- and fourth-party defendants will provide counsel for plaintiffs with any objections to plaintiffs' additional discovery. Counsel will meet during the week of July 31, 1995, to resolve any objections and to agree on a schedule for depositions and production of documents. By August 7, 1995, counsel will furnish the court with their agreed schedule and a short discussion of any unresolved discovery issues together with a synopsis of the parties' arguments;

(2) either waived or accepted service of process and waived any other jurisdictional defense within 40 days after the entry of this Memorandum and Order in any action commenced by a plaintiff in these actions in his home country or the country in which his injury occurred. Any plaintiff desiring to bring such an action will do so within 30 days after the entry of this Memorandum and Order;

(3) waived within 40 days after the entry of this Memorandum and Order any limitations-based defense that has matured since the commencement of these actions in the courts of Texas;

> (4) stipulated within 40 days after the entry of this Memorandum and Order that any discovery conducted during the pendency of these actions may be used in any foreign proceeding to the same extent as if it had been conducted in proceedings initiated there; and
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> (5) submitted within 40 days after the entry of this Memorandum and Order an agreement binding them to satisfy any final judgment rendered in favor of plaintiffs by a foreign court.

Any objections of plaintiffs concerning the waivers, stipulations, and agreements of defendants pursuant to subparagraphs (2), (3), (4), or (5) will be filed within 50 days after the entry of this Memorandum and Order. Any reply to such objections will be filed within 60 days after the entry of this Memorandum and Order.

b. Injunctive relief

In addition to dismissal, defendants urge the court to make permanent the preliminary injunction barring the plaintiffs and intervenor-plaintiffs from commencing any new case arising from the same facts as those presented in these cases. On June 19, 1995, the court entered an order preliminarily enjoining plaintiffs and intervenor-plaintiffs from commencing any new DBCP-related actions because the filing of additional actions would undermine the court's ability to fashion effective relief in the event defendants' motion to dismiss was successful. At that time defendants proffered evidence that "[d]efendants, either individually or collectively, face[d] an imminent threat of the commencement of new DBCP-related

actions in a court other than this Court."[125] Defendants argue that this is still the case and that a permanent injunction is necessary to ensure that plaintiffs do not harass them by instituting numerous actions and forcing repetitive litigation as to the inconvenience of various United States fora.

In general f.n.c. dismissals are without prejudice, but "nothing about a forum non conveniens dismissal requires a dismissal without prejudice."[126] Similarly, the ordinary f.n.c. dismissal is not accorded full res judicata effect. Thus,

> [a] forum non conveniens dismissal in one forum does not necessarily preclude the maintenance of an identical suit in another forum. . . . [However,] "the plaintiff in the new forum must do more than ask for a rebalancing of forum non conveniens considerations. He must show objective facts relevant to the issue that materially alter the considerations underlying the previous resolution."

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[125] Docket Entry No. 280 in H-94-1337, ¶ 2.

[126] *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 722 (5th Cir.1990), *cert. denied sub nom. Quintero v. Torvald Klaveness & Co., A/S*, 499 U.S. 925, 111 S.Ct. 1322, 113 L.Ed.2d 255 (1991) (This statement is dicta, however, because the district court's dismissal followed a decision on the merits: "Our court has noted that addressing the choice of law and applicability of law in maritime cases is a determination on the merits and, thus, [a motion seeking such determination including a motion to dismiss for f.n.c.] may be treated as a motion for summary judgment. Given that the district court determined, after discovery, that Philippine law governed this controversy, we conclude that the district court did reach the merits.").

Villar v. Crowley Maritime Corp., 780 F.Supp. 1467, 1482 (S.D.Tex.1992), aff'd, 990 F.2d 1489 (5th Cir.1993), cert. denied, 510 U.S. 1044, 114 S.Ct. 690, 126 L.Ed.2d 658 (1994) (approvingly quoting *Exxon Corp. v. Chick Kam Choo*, 817 F.2d 307 (5th Cir.1987), rev'd, 486 U.S. 140, 108 S.Ct. 1684, 100 L.Ed.2d 127 (1988)).

This court possesses authority pursuant to the All Writs Act, 28 U.S.C. § 1651(a), and its inherent powers, to enjoin the commencement of litigation in appropriate circumstances. The Anti-Injunction Act, 28 U.S.C. § 2283, does not disturb this power to the extent that the injunction bars further proceedings in federal court nor does it disturb the power to enjoin state court actions before such actions are commenced.[127] Plaintiffs argue that unlike other cases in which such injunctions have issued, this is not an appropriate case for injunctive relief because none of the current plaintiffs have filed repetitive actions in the past. If these actions are ultimately dismissed the record is unclear whether plaintiffs or intervenor-plaintiffs intend to refile their claims in other courts within the United States. Accordingly, plaintiffs may, within 40 days after the entry of this Memorandum

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[127] *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 639 n. 6, 97 S.Ct. 2881, 2889-90 n. 6, 53 L.Ed.2d 1009 (1977) (plurality opinion) ("[W]hat we must here decide is whether such a lawsuit may be enjoined by a federal court after it has been commenced, notwithstanding the bar of the Anti-Injunction Act. While we conclude that it may not, nothing in our opinion today prevents a federal court in the proper exercise of its jurisdiction from enjoining the commencement of additional state-court proceedings if it concludes from the course and outcome of the first one that such proceedings would constitute a violation of the antitrust laws.").

and Order, supplement the record by introducing evidence concerning their intentions and any argument addressing defendants' concerns about vexatious, repetitive litigation. Defendants will file any response within 10 days after receipt of plaintiffs' papers and plaintiffs may reply within 10 days after receipt of any response.

Because dismissal of these cases has not yet been accomplished, the court must examine the need for continued interim relief. The court concludes that it is still true that "[t]he filing of any new DBCP-related actions in the United States by plaintiffs and intervenor-plaintiffs in the present actions would substantially undermine this court's authority and ability to effectively rule on defendants' motion to dismiss for forum non conveniens and their motion for permanent injunctive relief and to grant meaningful relief if the court grants the motion."[128] Continuation of the preliminary injunction is also necessary to preserve the status quo and to preserve the court's jurisdiction and authority until the parties have taken the actions necessary to give effect to the terms of this Memorandum and Order.

Absent continued preliminary injunctive relief, the individuals whom defendants seek to permanently enjoin may take the precise actions this court is being asked to enjoin. Moreover, defendants have successfully opposed remand in the actions still pending in this court and have demonstrated a substantial likelihood that they will succeed on the motions to dismiss for f.n.c. and their motions for permanent injunctive relief. Finally, it is still

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[128] Docket Entry No. 280 in H-94-1337, ¶ 3.

true that (1) defendants and the court system of the United States would suffer irreparable harm for which there is no adequate remedy at law from the refiling of DBCP-related lawsuits in this country, (2) the threatened injury to defendants and the legal system outweighs any prejudice to plaintiffs, intervenor-plaintiffs, and their counsel, (3) a preliminary injunction will serve the public interest, and (4) no security pursuant to Fed.R.Civ.P. 65(c) is necessary because the primary purpose of this Memorandum and Order is to preserve the court's ability to effectively rule on matters presently before it, to order meaningful relief with respect to motions pending before it, and to prevent abuse of the judicial system.

Accordingly, the court concludes that the preliminary injunction previously issued shall remain in effect pending further order of this court. For the same reasons the court also AMENDS its previous order and PRELIMINARILY ENJOINS plaintiffs and intervenor-plaintiffs in Delgado, Jorge Carcamo, Valdez, and Isae Carcamo, and anyone acting in active concert or participation with any of the foregoing persons who receive actual notice of this Memorandum and Order by personal service or otherwise, including, but not limited to, the attorneys who have appeared in these consolidated actions and their law firms, as well as the officers, agents, servants, employees of any of the foregoing persons, from intervening in *Rodriguez* or *Erazo* or any other pending action in the United States involving DBCP-related claims.

c. Return

Notwithstanding the dismissals that may result from this Memorandum and Order, in the event that the highest court of any foreign country finally affirms the dismissal for lack of jurisdiction of any action commenced by a plaintiff in these actions in his home country or the country in which he was injured, that plaintiff may return to this court and, upon proper motion, the court will resume jurisdiction over the action as if the case had never been dismissed for f.n.c.

2. Other motions

In addition to defendants' motion to dismiss for f.n.c. a number of other motions are pending. Because Delgado, Jorge Carcamo, Valdez, and Isae Carcamo may be dismissed in 90 days, all pending motions in those cases not otherwise expressly addressed in this Memorandum and Order are DENIED as MOOT. Because Rodriguez and Erazo have been remanded, the court will refrain from addressing any further issues raised by pending motions in those cases.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 95-21074

FRANKLIN RODRIGUEZ DELGADO, ET AL; (Individually and on behalf of all others similarly situated)

Plaintiffs-Appellants-Cross-Appellees

v.

SHELL OIL COMPANY; DOW CHEMICAL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (Individually and as successor to Occidental Chemical Company and Occidental Chemical and Agricultural Products, Inc); STANDARD FRUIT CO; STANDARD FRUIT AND STEAMSHIP COMPANY; DOLE FOOD COMPANY, INC; DOLE FRESH FRUIT CO; CHIQUITA BRANDS INC; CHIQUITA BRANDS INTERNATIONAL, INC; DEL MONTE TROPICAL FRUIT COMPANY;

Defendants-Appellees-Cross-Appellants

DEL MONTE FRESH PRODUCE, N A

Defendant-Third Party Plaintiff-Appellee-Cross-Appellant

v.

DEAD SEA BROMINE COMPANY, LTD; AMBERIBROM [sic], INC;

Third Party Defendants-Appellees-Cross-Appellants

****

JORGE COLINDRES CARCAMO, ET AL; (Individually, and on behalf of all others similarly situated)

Plaintiffs-Appellants-Cross-Appellees

v.

SHELL OIL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (Individually and as successor to Occidental Chemical and Occidental Chemical and Agricultural Products, Inc); STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; DOLE FOOD COMPANY, INC; DOLE FRESH FRUIT COMPANY; CHIQUITA BRANDS, INC; CHIQUITA BRANDS INTERNATIONAL, INC;

Defendants-Appellees-Cross-Appellants

DOW CHEMICAL COMPANY;

Defendant-Third Party Plaintiff-Appellee-Cross-Appellant

v.

DEL MONTE FRESH PRODUCE COMPANY (sued as Del Monte Tropical Fruit Company); DEAD SEA BROMINE COMPANY LTD; AND AMERIBROM, INC;

Third Party Defendants-Appellees-Cross-Appellants

DEL MONTE FRESH PRODUCE, N A, INC;

Third Party Defendant-Fourth Party Plaintiff-Appellee-Cross-Appellant

v.

BROMINE COMPOUNDS LTD;

Fourth Party Defendant-Appellee-Cross-Appellant

****

JUAN RAMON VALDEZ, ET AL;

Plaintiffs-Appellants-Cross-Appellees

v.

SHELL OIL COMPANY; OCCIDENTAL CHEMICAL CORPORATION (Individually and as successor to Occidental Chemical Company and Occidental Chemical and Agricultural Products, Inc); STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; DOLE FOOD COMPANY, INC; DOLE FRESH FRUIT COMPANY; CHIQUITA BRANDS, INC; CHIQUITA BRANDS INTERNATIONAL, INC;

Defendants-Appellees-Cross-Appellants

DOW CHEMICAL COMPANY;

Defendant-Third Party Plaintiff-Appellee-Cross-Appellant

v.

DEL MONTE FRESH PRODUCE, N A; DEL MONTE TROPICAL FRUIT COMPANY; DEAD SEA BROMINE COMPANY LTD; AMERIBROM INC;

Third Party Defendants-Appellees-Cross-Appellants

****

ISAE CARCAMO;

Plaintiff-Appellant-Cross-Appellee

v.

DOW CHEMCIAL [sic] COMPANY; OCCIDENTAL CHEMICAL CORPORATION (Individually and as successor to Occidental Chemical Company and Occidental Chemical and Agricultural Products, Inc); STANDARD FRUIT COMPANY; STANDARD FRUIT AND STEAMSHIP COMPANY; DOLE FOOD COMPANY, INC; DOLE FRESH FRUIT COMPANY;

Defendants-Appellees-Cross-Appellants

SHELL OIL COMPANY

Defendant-Third Party Plaintiff-Appellee-Cross-Appellant

v.

DEAD SEA BROMINE COMPANY LTD; AMERIBROM, INC;

Third Party Defendants-Appellees-Cross-Appellants

Appeals from the United States District Court for the Southern District of Texas, Houston

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ON PETITION FOR REHEARING

(Filed Nov. 16, 2000)

Before GARWOOD, WIENER, and DeMOSS, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

ENTERED FOR THE COURT:

/s/ Harold R. DeMoss
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

GERARDO DENNIS PATRICKSON; RODOLFO BERMUDEZ ARIAS; BENIGNO TORRES HERNANDEZ; FERNANDO JIMENEZ ARIAS; SANTOS LEANDROS; HERMAN ROMERO AGUILAR; ELIAS ESPINOZA MERELO HOOKER ERA CELESTINO; ALIRIO MANUEL MENDEZ; and CARLOS HUMBERTO RIVERA, individually and on behalf of others similarly situated, Plaintiffs, vs. DOLE FOOD COMPANY, INC.; DOLE FRESH FRUIT COMPANY; DOLE FRESH FRUIT INTERNATIONAL, LIMITED; DOLE FRESH FRUIT INTERNATIONAL, INC.; PINEAPPLE GROWERS ASSOCIATION OF HAWAII; AMVAC CHEMICAL CORPORATION; SHELL OIL COMPANY; DOW CHEMICAL	CIVIL NO. 97-01516 HG ORDER DENYING PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO THE DEAD SEA DEFENDANTS' ASSERTION OF FOREIGN SOVEREIGN IMMUNITIES ACT JURISDICTION and DENYING PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO THE SUPPLEMENTAL GROUNDS FOR REMOVAL and GRANTING CERTAIN DEFENDANTS' MOTION TO DISMISS AND FOR INJUNCTIVE RELIEF FILED DECEMBER 24, 1997 and DENYING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS'

COMPANY; OCCIDENTAL CHEMICAL CORPORATION (individually and as successor to Occidental Chemical Company and Occidental Chemical Company and Occidental Chemical Agricultural Products, Inc., Hooker Chemical and Plastics, Occidental Chemical Company of Texas and Best Fertilizer Company); STANDARD FRUIT COMPANY AND STEAMSHIP COMPANY; STANDARD FRUIT COMPANY de COSTA RICA, S.A.; STANDARD FRUIT COMPANY de HONDURAS, S.A.; CHIQUITA BRANDS, INC.; CHIQUITA BRANDS INTERNATIONAL, INC. (individually and as successor in interest to United Brands Company, Inc.); MARITROP TRADING CORPORATION; DEL MONTE FRESH PRODUCE, N.A.; DEL MONTE FRESH PRODUCE COMPANY; DEL MONTE FRESH PRODUCE HAWAII INC.; DEL MONTE FRESH PRODUCE COMPANY AND FRESH	)	SUPPLEMENTAL AFFIDAVITS

DEL MONTE N.V.; JOHN DOES 1-10; JANE DOES 1-10; DOE PARTNERSHIPS 1-10; and DOE CORPORATIONS 1-10,

Defendants.

ORDER DENYING PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO THE DEAD SEA DEFENDANTS' ASSERTION OF FOREIGN SOVEREIGN IMMUNITIES ACT JURISDICTION

and

DENYING PLAINTIFF'S MOTION FOR REMAND AND IN OPPOSITION TO THE SUPPLEMENTAL GROUNDS FOR REMOVAL

and

GRANTING CERTAIN DEFENDANTS' MOTION TO DISMISS AND FOR INJUNCTIVE RELIEF FILED DECEMBER 24, 1997

and

DENYING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' SUPPLEMENTAL AFFIDAVITS

Plaintiffs bring this action based on claims that arose out of their alleged exposure to the chemical pesticide dibromochloropropane ("DBCP") while working on farms in Costa Rica, Ecuador, Guatemala, and Panama. Following removal from state court, Plaintiffs filed motions to remand and certain Defendants filed a motion to dismiss. This action is currently before the court on 1)

Plaintiffs' Motion for Remand and In Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction; 2) Plaintiffs' Motion for Remand and In Opposition to the Supplemental Grounds for Removal; and 3) Certain Defendants' Motion to Dismiss and for Injunctive Relief filed December 24, 1997. For the reasons set forth below, the Court finds 1) that removal under the Foreign Sovereign Immunities Act was not proper; 2) removal under the supplemental grounds for removal was proper; 3) the action should be dismissed on forum non conveniens grounds; and 4) no injunction will issue prohibiting the filing of further suits relating to the issues in this action.

I. BACKGROUND

On October 3, 1997, Plaintiffs commenced this action by filing a complaint in the Circuit Court of the First Circuit of the State of Hawaii. Plaintiffs' complaint, as amended and set forth in the Amended Complaint filed March 3, 1998, was filed by nine foreign plaintiffs who are residents of the countries of Costa Rica, Ecuador, Guatemala, and Panama. Plaintiffs bring this action as a class action on behalf of themselves and others similarly situated. Defendants in this action consist of 20 corporations, some of which have principal places of business outside of the United States.

Plaintiffs allege that as a result of their exposure to DBCP, they have suffered serious and permanent injuries. They claim that Defendants are liable under various causes of action for manufacturing, selling, distributing, supplying and designing DBCP products. Specifically,

Plaintiffs set forth claims of 1) negligence; 2) conspiracy; 3) strict liability; 4) intentional tort; 5) breach of implied warrant; 6) compensatory damages; and 7) punitive damages.

On October 31, 1997, Defendant Dole Food Company, Inc. filed a third-party complaint in the action naming Dead Sea Bromine Co., Ltd. ("Dead Sea") and Bromine Compounds Limited ("BCL") (collectively, the "Dead Sea Defendants") as third-party defendants.

On October 31, 1997, the Dead Sea Defendants removed the action to this Court by timely filing a Notice of Removal. Removal was made under 28 U.S.C. § 1441(d) which allows for removal by an entity covered by the Foreign Sovereignty Immunities Act ("FSIA"). 28 U.S.C. § 1602-1611.

On November 3, 1997, Defendant Dole Food Company, Inc. timely filed a Supplemental Notice of Removal which was consented to by all of the other defendants. The Supplemental Notice of Removal states that federal question jurisdiction and diversity jurisdiction provide supplemental bases for subject matter jurisdiction.

On December 2, 1997, Plaintiffs filed a Motion for Remand and in Opposition to the Supplemental Grounds for Removal and on December 3, 1997, Plaintiffs filed a Motion for Remand and in Opposition to the Dead Sea Defendants' Assertion of Foreign Sovereign Immunities Act Jurisdiction. On March 19, 1998, Defendants filed an Opposition to Plaintiffs' motions to remand. On March 26, 1998, Plaintiffs filed a reply. On March 19, 1998, the Dead Sea Defendants filed an opposition to Plaintiffs'

Motion for Remand. On March 25, 1998, Plaintiffs filed a reply.

On December 24, 1997, all of the Defendants in the action at the time, with the exception of Defendant AMVAC Chemical Corporation, filed a Motion to Dismiss and for Injunctive Relief. On March 19, 1998, the Dead Sea Defendants filed a statement of consent in connection with the motion to dismiss and for injunctive relief. Plaintiffs filed a response to Defendants' motion on March 18, 1998. On March 26, 1998, Defendants filed a reply. On April 3, 1998, Plaintiffs filed a motion to strike certain supplemental affidavits attached to Defendants' reply. A hearing on Plaintiffs' motions for remand and motion to strike and on Defendants' motion to dismiss and for injunctive relief was held on April 6, 1998.

II. PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO FOREIGN SOVEREIGNTY IMMUNITIES ACT JURISDICTION

A. Standard of Review

Where a case is removed to federal court there is a strong presumption against federal court jurisdiction. *Gaus v. Miles*, 980 F.2d 564, 566 (9th Cir. 1992) (citing *Nishimoto v. Federman-Bachrach & Assocs.*, 903 F.2d 709, 712 n.3 (9th Cir. 1990)). The defendant, who is the removing party, bears the burden of proving the propriety of removal, including jurisdiction. *Id.*; *Nishimoto*, 903 F.2d at 712 n.3; *Trenton v. Infinity Broadcasting Corp.*, 865 F. Supp. 1416, 1421 (C.D. Cal. 1994). The Ninth Circuit strictly construes the removal statute against removal jurisdiction. *Gaus*, 980 F.2d at 566; *Dunn v. Pepsi-Cola Metropolitan*

Bottling Co., Inc., 850 F. Supp. 853, 855 (N.D. Cal. 1994). Federal jurisdiction must be rejected if there is any doubt as to the right of removal in the first instance. *Id.* In determining whether they should remand a removed civil action due to lack of subject matter jurisdiction, courts should resolve any doubt in favor of remand. 28 U.S.C.A. §§ 1441(a), 1447(c). *See St. Francis Hosp. and Med. Ctr. v. Blue Cross & Blue Shield of Connecticut, Inc.*, 776 F. Supp. 659, 661 (D. Conn. 1991).

B. Foreign State Status Under the FSIA

The Dead Sea Defendants removed Plaintiffs' Complaint pursuant to 28 U.S.C. § 1441(d) which provides that "[a]ny civil action brought in a State court against a foreign state as defined in section 1603(a) . . . may be removed by the foreign state[.]" 28 U.S.C. § 1441(d). The issue now before the Court is whether the Dead Sea Defendants qualify as foreign states under 28 U.S.C. § 1603(a). The definition of a foreign state "includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. § 1603(a). The parties do not contend that Dead Sea and BCL acted as political subdivisions of Israel, therefore, the court must decide whether the Dead Sea Defendants are agencies or instrumentalities of Israel as defined in 28 U.S.C. § 1603(b).

The FSIA defines "agency or instrumentality" as any entity:

> (1) which is a separate legal person, corporate or otherwise, and

> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state . . . , and
>
> (3) which is neither a citizen of a State of the United States . . . , nor created under the laws of any third country.

28 U.S.C. § 1603(b). In the instant case, there is no dispute that Defendants satisfy the first and third requirements for agency or instrumentality status; the parties only dispute whether the second requirement is satisfied.

Defendants contend that Dead Sea and BCL are agencies and instrumentalities of Israel. They assert that they are organs of the State of Israel and that the State of Israel, at all relevant times, held a majority ownership interest in both Dead Sea and BCL Plaintiffs argue that the Dead Sea Defendants are not organs of Israel and that the State of Israel does not directly own a majority of shares of either Dead Sea Defendant.

Plaintiffs and Defendants also disagree as to what time period is relevant to making the determination of foreign state status. Defendants argue that the relevant period is the period of the alleged wrongdoing. Plaintiffs disagree, and urge the Court to look to the date upon which the Complaint was filed, October 3, 1997.

1. Relevant Time Period for Determining Foreign Sovereign Status

At the time the suit was filed, Israel was only a minority shareholder of the Dead Sea Defendants. (Dead Sea Defendants' Notice of Removal, at ¶ 4(d); Declaration

of Motti Levin, ¶ 5, attached as Exh. 5 to Plaintiffs' Motion for Remand and In Opp. to Dead Sea Defendants' Assertion of FSIA Jurisdiction.) Defendants contend that this dies not affect removal under 28 U.S.C. § 1441(d) because foreign sovereign status at the time of the alleged wrongdoing is sufficient for removal of the action.

The issue is whether the FSIA applies when foreign sovereign status which existed at the time of the alleged wrongdoing is subsequently lost has been addressed by two circuits. In *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 447 (6th Cir. 1988), a defendant which was majority-owned by France at the time of the alleged wrongdoing moved to dismiss the complaint on the basis of lack of subject matter jurisdiction under the FSIA. During the pendency of an interlocutory appeal, that defendant's corporation's shares were sold to a private entity. *Id.* at 449. On appeal, the plaintiff contended that because France was no longer a majority owner of the defendant, the defendant could not qualify as a foreign state and would not be immune with respect to its conduct after the change of ownership. *Id.* The Sixth Circuit rejected the plaintiff's argument, stating, "[a]s to completed acts upon which the complaint is based, the parties are bound by the jurisdictional facts existing at the time of those acts." *Id.* at 450. The court found that determination of whether a party is subject to the court's jurisdiction under the FSIA should be based upon a party's status at the time the act complained of occurred. *Id.*

In *General Electric Capital Corp. v. Grossman*, 991 F.2d 1376 (8th Cir. 1993), the plaintiffs filed suit against Air

Canada and other defendants claiming that they conspired to suppress information about a plaintiff's financial status. *Id.* at 1379. Air Canada moved to dismiss on the basis that at the time of the alleged wrongdoing, it qualified as a foreign state under the FSIA. *Id.* Rejecting the plaintiff's arguments that the FSIA did not apply because Air Canada was no longer foreign owned at the time suit was filed, the district court found that Air Canada was entitled to immunity under the FSIA and granted the motion to dismiss. *Id.* The Eighth Circuit affirmed, holding that FSIA immunity applies to an entity which qualified as a "foreign state" at the time of the alleged wrongdoing but not at the time the suit was filed. *Id.* 1380-82. In coming to its conclusion, the court rejected the same argument that Plaintiffs in this action make regarding the use of the present tense in the FSIA. *Id.* at 1381. The court found that use of the present tense in the FSIA did not mean that immunity under the FSIA exists only if an entity is a foreign state at the time suit is brought. *Id.* The court reasoned that "[t]he doctrine of foreign state sovereign immunity was 'created to effectuate general notions of comity among nations.' . . . [t]he foreign policy concerns discouraging us from judging the acts of another nation are not necessarily eliminated because an entity is not a foreign state at the time of suit." *Id.* (citations omitted).

This Court finds the reasoning of the Sixth and Eighth Circuits to be persuasive. The FSIA sets forth the general rule that foreign states are immune from the jurisdiction of federal and state courts. *Siderman de Blake v. Republic of Argentina*, 965 F.2d 699, 706 (9th Cir. 1992). The suit is premised on facts that existed at the time of

the alleged wrongdoing. *See Gould*, 853 F.2d at 450. The absence of foreign state status at the time the suit was filed does not negate the foreign policy concerns underlying the doctrine of sovereign immunity. *Grossman*, 991 F.2d at 1382.

Plaintiffs point to two Ninth Circuit decisions, *Wolf v. Banco Nacional de Mexico, S.A.*, 739 F.2d 1458 (9th Cir. 1984) and *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994) to support their contention that foreign status must be determined at the time the suit is filed. Both cases establish that FSIA immunity can apply to entities that became entitled to foreign sovereign protection after the alleged wrongdoing. *Wolf*, 739 F.2d at 1460; *Straub*, 38 F.3d at 451. Neither case, however, addresses the issue before the Court of whether the FSIA applies when foreign sovereign status which existed at the time of the alleged wrongdoing is subsequently lost.

Based on the foregoing, the Court finds that the Dead Sea Defendants can be entitled to FSIA foreign state status if it is determined that they met the FSIA foreign state requirements at the time the alleged wrongdoing occurred.

2. Majority Ownership by the State of Israel

Defendants contend that Dead Sea and BCL qualify as agencies or instrumentalities of the State of Israel because the State of Israel held a majority ownership interest in both Dead Sea and BCL. During the time period in question, the State of Israel did not directly own either Dead Sea or BCL. At all relevant times, the chain of

ownership between the State of Israel and the Dead Sea Defendants included intermediary corporations. (See Appendix to Memo. of Law of Third Party Defendants Dead Sea Bromine Co., Ltd. and Bromine Compounds Limited in Opposition to Plaintiff's Motion to Remand ("Dead Sea Appendix"), Exh. B.) For example, from 1970 to 1975, the State of Israel owned 99% of an entity named Dead Sea Works which in turn owned 99.9% of Dead Sea. Dead Sea owned 50% of BCL and Dead Sea Works owned 25% of BCL. (Dead Sea Appendix, Exh. B.) After 1975, another entity was added to the chain of ownership when the State of Israel conveyed its ownership of Dead Sea Works to Israel Chemicals Ltd., an Israeli corporation wholly owned by the State of Israel. (Decl. of Noah Ehrlich dated December 18, 1997, at ¶ 12, at Dead Sea Appendix A.) Any ownership interest of Dead Sea and BCL claimed by the State of Israel was completely indirect at all relevant times.

The Court must determine if the indirect ownership is sufficient to meet the requirements of § 1603(b). The specific issue is whether indirect ownership through a subsidiary entitles an entity to be considered an agency or instrumentality of a foreign state.

Gates v. Victor Fine Foods, 54 F.3d 1457 (9th Cir. 1995), is the most recent Ninth Circuit decision which discusses the requirements of agency or instrumentality status. While the case is not entirely on point, it is deserving of a lengthy examination.

In *Gates*, the plaintiffs were employees who were terminated when their employer closed its business. *Gates*, 54 F.3d at 1459. They brought an action against

several companies including Fletcher's Fresh Food ("FFF"), their employer's parent company, and Alberta Pork Products, FFF's parent company. *Id.* Alberta Pork and FFF moved to dismiss for lack of subject matter jurisdiction pursuant to the FSIA. *Id.* The district court assumed that Alberta Pork and FFF were foreign states under the FSIA, and denied the motion to dismiss upon concluding that FFF and Alberta Pork were not immune from the court's jurisdiction because their actions fell under the commercial activity exception to FSIA immunity. *Id.* Alberta Pork and FFF appealed. *Id.*

On appeal the Ninth Circuit addressed whether Alberta Pork and FFF qualified as foreign states under § 1603(b)(2). *Id.* at 1459-60. Noting that the legislative history of the FSIA suggests that "Congress intended the terms "organ" and "agency or instrumentality" to be read broadly[,]" the court concluded that Alberta Pork was an agency or instrumentality of the Province of Alberta by virtue of it being an organ of a foreign state. *Id.* at 1460-61.

The Ninth Circuit then considered the status of FFF under § 1603(b)(2). It noted that FFF, "an ordinary pork processing plant, [could not] be considered an 'organ' of the Province of Alberta[,]" so it looked to see if a majority of the shares of FFF were owned by a foreign state. *Id.* at 1461-62. It concluded that because FFF was wholly owned by Alberta Pork, an organ of the Province of Alberta, a majority of FFF shares were not owned by a foreign state as is required by the statute. *Id.* at 1462. The court went on to say,

> As it is written, the Act provides potential immunity to entities that are either organs of a foreign state or political subdivision thereof or have a majority of shares owned by the foreign state or political subdivision. To add to that list entities that are owned by an agency or instrumentality would expand the potential immunity considerably because it would provide potential immunity for every subsidiary in a corporate chain, no matter how far down the line, so long as the first corporation is an organ of the foreign state . . . or has a majority of its shares owned by the foreign state[.]" *Id.*

The court concluded that FFF did not have status as an agency or instrumentality because it was not an organ of a foreign state nor was it majority-owned by a foreign state. *Id.* at 1462-63.

In a later decision, *Corporation Mexicana de Servicios Maritimos S.A. de C.V. v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996), the Ninth Circuit reiterated its findings in *Gates*. The court stated that "the ownership test of § 1603(b)(2) applie[s] only to the first tier of ownership: an entity wholly owned by 'an agency or instrumentality of a foreign state' is not owned by a 'foreign state or a political subdivision thereof' and therefore does not meet the definition of § 1603(b)(2)." *Corporation Mexicana*, 89 F.3d at 655 (citation omitted).

The facts in the instant case differ from those in *Gates* as this Court is not confronted with a subsidiary of an organ of a foreign state claiming foreign state status. The issue here is indirect ownership by the State of Israel through a corporate chain. *Gates* and *Corporacion Mexicana* nevertheless provide substantial guidance.

In *Gates*, the Ninth Circuit sought to limit the potential immunity offered to foreign states to those agencies or instrumentalities that have a direct relationship with the foreign state. *Gates*, 54 F.3d at 1462. It pointed out that Congress "could easily have stated that an entity must be owned by a foreign state, a political subdivision or an agency or instrumentality of a foreign state or political subdivision[,]" but did not. *Id.* The Ninth Circuit was careful not to put "words in Congress' mouth" and found that a contrary reading of the statute could expand immunity far beyond what Congress intended. *Id.*

The language in *Gates* clearly encompasses both organ and majority shareholder status. *See Gates*, 54 F.3d at 1462. The Ninth Circuit indicated that including entities that are owned by an agency or instrumentality would expand potential immunity considerably because it would provide immunity to every subsidiary in a corporate chain, "so long as the first corporation is an organ of the foreign state . . . *or has a majority of its shares owned by the foreign state*" *Id.* (emphasis added) (footnote omitted). Additionally, the Ninth Circuit's reference in *Corporacion Mexicana* that the ownership test of § 1603(b)(2) applies only to the first tier of ownership is compelling. *Corporacion Mexicana*, 89 F.3d at 655. Had the Ninth Circuit intended to limit the ownership test of § 1603(b)(2) to organ situations, it would have specifically limited its holdings.

The Seventh Circuit, in *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932 (7th Cir. 1996), however, did address the issue now before this Court, and found the Ninth Circuit's opinion in *Gates* unpersuasive. The plaintiffs in that case sued the airline, American Eagle, its

parent company AMR and Avions de Transport Regional, G.I.E. ("ATR"), the aircraft manufacturer, for wrongful death as a result of the crash of American Eagle Flight 4184. *Id.* at 935. ATR was indirectly owned by the French and Italian governments through two European commercial aerospace companies. *Id.* The shares of the French parent company, SNIA, were 62.16% owned directly by the French government. *Id.* Alenia, the Italian parent company, was 62.14% owned by the Italian Instituto Per La Reconstruzione Indusriale ("IRI"), IRI was a holding company wholly owned by the Italian government. *Id.* at 936. Through these intermediaries, France and Italy retained nearly 75% of ATR. *Id.*

The Seventh Circuit disagreed with the Ninth Circuit's discussion of § 1603(b) (2) in *Gates*, and found that "[a]lthough France and Italy controlled ATR through intervening entities, the language and legislative history consistent with the language of the FSIA demonstrate that ATR is the type of corporation included within the statutory definition of foreign state." *Id.* at 941 (internal quotations omitted). In *Gates*, the Ninth Circuit found that the use of the word "includes" in 28 U.S.C. § 1603(a) limits the definition of "foreign state". *Gates*, 54 F.3d at 1462. It stated, "the statute provides that a foreign state includes an agency or instrumentality, not that it is an agency or instrumentality or that it is defined as an agency or instrumentality." *Id.* The Seventh Circuit, however, found that the use of the word "includes" shows Congress' intent to broadly define "foreign state." *Air Crash*, 96 F.3d at 940. The Seventh Circuit reasoned that the entirety of the FSIA indicates that "if a foreign state as

defined in § 1603(a) includes an agency or instrumentality of a foreign state, then a corporation that is majority-owned by a foreign state includes a corporation majority owned by an agency or instrumentality of a foreign state." *Id.* (citation and internal quotations omitted.) This decision directly contradicts the Ninth Circuit's reasoning and holding in *Gates.*

In *Hyatt Corp. v. Stanton,* 945 F. Supp. 675, 688 (S.D.N.Y. 1996), the court discussed both the Ninth and Seventh Circuit's interpretation of § 1603(b)(2), and found that "[n]either the Ninth nor the Seventh Circuits' attempt to explain away the inconsistency [in the section] is dispositive." The court averred that Congress' intentions must be inferred from other sources and not from the language of the text. *Id.* The court discussed the fact that Congress rejected in the FSIA the "separate entity rule" for foreign corporations owned by foreign states which is the prevailing international rule. *Id.* The separate entity rule presumes that entities with separate legal personalities do not have sovereign status. *Id.* The FSIA reversed this presumption and Congress expressly gave corporations owned by foreign states immunity, subject to the commercial activity exception. *Id.* The court reasoned that because Congress was unambiguous in its departure from the prevailing international rule, and because of the serious consequences of a further extension of the FSIA to include corporations owned by agencies and instrumentalities, Congress would have been just as explicit in stating its intention that such entities fall under the FSIA if it so intended. *Id.* at 689-90. The court found that a corporation whose shares are owned by an

agency or instrumentality of a foreign state is not a foreign state under the FSIA. *Id.* at 690.

While there are cases in the Ninth Circuit where the court has allowed a corporation that is indirectly owned by a foreign state to maintain foreign state status, there was no reference to the issue now before this Court. In fact, the cases came to the court with a presumption of foreign state status, and the court was requested to decide other issues. *See America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793 (9th Cir. 1989); *Straub v. A.P. Green, Inc.*, 38 F.3d 448 (9th Cir. 1994). Furthermore, each of these cases was decided prior to the Ninth Circuit's decision in *Gates*.

Based on the foregoing, the Court finds that Israel's indirect ownership of Dead Sea and BCL through several intermediary corporations does not qualify Dead Sea and BCL as agencies or instrumentalities of a foreign state pursuant to 28 U.S.C. § 1603(b) (2). Dead Sea and BCL are not entities whose majority of shares or other ownership interest are owned by a foreign state.

3. Organs of the State of Israel

Dead Sea and BCL also argue that they have foreign state status because they are organs of the State of Israel. They allege that courts look to two categories when deciding organ status: "(i) whether the entity advanced the interests of the foreign sovereign; and (ii) whether the foreign sovereign supervised and/or exercised control over the entity so as to circumscribe the entity's ability to act independently." (Dead Sea and BCL's Opp. at 18.)

They contend that their relationship with the state of Israel encompasses both of these factors.

As mentioned earlier, in *Gates* the Ninth Circuit determined that Alberta Pork, the parent corporation, was an organ of the Province of Alberta. Alberta Pork was a Canadian corporation established pursuant to the Alberta Marketing of Agricultural Products Act to provide for the effective marketing and promotion of hogs produced in the Province of Alberta. *Gates*, 54 F.3d at 1459. Alberta Pork served as the sole marketing agent through which hogs raised in Alberta were sold. *Id.* Hog producers were required to sell their hogs to Alberta Pork which in turn sold the hogs to pork producers and remitted the proceeds to the producers. *Id.*

The Ninth Circuit determined that Alberta Pork was an organ not by applying a rigid test, but by analyzing the characteristics of the relationship been Alberta Pork and the Province of Alberta. Under Alberta law, producers of an agricultural product could apply to the Alberta Agricultural Products Marketing Council ("Council") for approval to establish a marketing board. *Gates*, 54 F.3d at 1460. The hog producers in Alberta submitted a plan to the Council to create a marketing board for their industry. *Id.* It was approved, and Alberta Pork was formed. *Id.*

The Council did not exercise day-to-day control over the marketing boards like Alberta Pork, but it played a supervisory role. *Id.* Once a marketing board was established, it could "act only in a manner and on the subject that the Council has previously authorized." *Id.* at 1461. For example, when Alberta Pork wanted to buy FFF, the

Council had to issue a regulation approving the acquisition. *Id.*

The Council could also require a board to provide it with all of its records, ask a board to amend or repeal its regulations, and amend or repeal the board's regulations itself if the board had not done so within 45 days. *Id.* A board could not issue regulations without the approval of the Council, and if the regulations conflicted with the Council's regulations, the Council's regulations prevailed. *Id.* If a producer was not satisfied with a decision of a board, it could appeal to an appellate body appointed by the Minister.[1] *Id.* Furthermore, the members of a board were granted immunity for their acts performed while carrying out their duties of the board.[2] *Id.* The Court concluded that because Alberta Pork advanced the interest of the Province of Alberta in marketing hogs, and because the laws and regulations of the Province narrowly circumscribed Alberta Pork's ability to act independently, Alberta Pork squarely fit within the definition of an organ. *Id.*

In *Corporacion Mexicana*, the Ninth Circuit found that Pemex-Refining was an organ of the government of Mexico. *Corporacion Mexicana*, 89 F.3d at 655. Pemex-Refining was created by a presidential decree to restructure Pemex-Refining's parent company. *Id.* at 654. Pemex-Refining was responsible for the refining, manufacturing,

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[1] The court found this significant, and stated that based on this characteristic a board resembled an administrative agency. *Id.*

[2] The court noted that immunity was normally only "afforded to government actors." *Id.*

and distributing of petroleum based products in Mexico. *Id.*

In finding that Pemex-Refining was an organ of the government of Mexico, the Ninth Circuit relied on the district court's analysis which explained that Pemex-Refining:

> is an integral part of the United Mexican States. Pemex[-Refining] was created by the Mexican Constitution, Federal Organic Law, and Presidential Proclamation; it is entirely owned by the Mexican Government; is controlled entirely by government appointees; employs only public servants; and is charged with the exclusive responsibility of refining and distributing Mexican government property. Thus Pemex[-Refining] is a subdivision of the United Mexican States and therefore qualifies for foreign sovereign immunity under FSIA.

Id. at 655. The court reasoned that compared to Alberta Pork, Pemex-Refining "is much more of an 'organ' of the government of Mexico than Alberta Pork is of the province of Alberta." *Id.*

The Ninth Circuit has not provided a clear test to determine organ status, but its decisions indicate characteristics that make an entity an organ. Characteristics that supported the Ninth Circuit's finding of organ status in both *Gates* and *Corporacion Mexicana* include: (1) the entity was created by the government; (2) the entity served an important government purpose; (3) the entity represented the interests of the government; (4) the entity

was charged with exclusive responsibility;[3] (5) the government exercised a supervisory role over the entity; and (6) that the entity's ability to act independently was circumscribed by the government. The court also looked at whether the entity employed only government employees, whether the entity acted as an administrative agency, and whether the employees were granted governmental immunity. Not all of these factors need to be present to maintain organ status, however, the entity should at least appear to at in concert with the foreign government at some level.[4]

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[3] In *Gates*, Alberta Pork was the only pork board, and in *Corporacion Mexicana*, Pemex-Refining was the only body that refined and distributed Mexican petroleum resources.

[4] In *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 673 (C.D. Cal. 1993), the district court discussed the organ status of Australian National University and focused on the fact that the University furthered the academic interests of national importance, that salaries of its employees were paid by the Australian government, that the University submitted annual reports regarding funding to the Australian government, and that the University was treated like an agency in other Australian legislation. In *Supra Medical Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Penn. 1997), the district court, citing *Corporacion Mexicana*, indicated that to determine organ status a court should consider "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the country; and (5) how the entity is treated under foreign state law." These cases demonstrate that a hard and fast rule is not applied. Instead the court looks at the relationship between the entity and the foreign government and determines on an ad hoc basis whether the relationship is sufficient to find organ status.

Defendants support their argument that Dead Sea and BCL maintain organ status by providing the court with substantial information regarding Dead Sea's and BCL's relationship with the State of Israel. Defendants argue that they advanced vital national interests of the State of Israel because they developed and commercially exploited Israel's natural resources. The minerals extracted from the Dead Sea by Defendants were owned by the State of Israel. (Dead Sea appendix, Exh. E. at E001.) Defendants show that they operated under an exclusive statutory concession and subconcession granted by the Israeli legislature to mine the Dead Sea and to market and sell the minerals and their compounds. (Dead Sea Appendix, Exh. E, § 2 and Exh. F, § 2.) The State of Israel was paid a royalty for the extracted minerals. (Dead Sea Appendix, Exh. E., § 15 and Exh. F., § 17.) The Dead Sea Defendants contend that the "economic exploitation of these natural resources is vital to the national interests of the State of Israel[.]" (Dead Sea and BCL Opp., at 19.)

Defendants argue that the exploitation of the State's natural resources is analogous to the activities of Pemex-Refining, the entity discussed in *Corporacion Mexicana*. As discussed above, Pemex-Refining was an entity created by the Mexican government for the specific purpose of refining and distributing oil and gas. *Corporacion Mexicana*, 89 F.3d at 655. While the activity may be similar, the position that Pemex-Refining held in relation to the Mexican government was much closer than the position that Dead Sea and BCL hold in relation to the State of Israel. Dead Sea and BCL are not controlled entirely by government appointees (Dead Sea Appendix., Exh. G., §§ 37, 48), do not employ only public servants (Ehrlich Depo., at

125:21-25 at Dead Sea Appendix, Exh. TT), and are not entirely owned by the State of Israel (Dead Sea Appendix., Exh. A. §§ 9-16.)

Defendants also contend that the State of Israel controlled, regulated and supervised Dead Sea and BCL's activities. They explain that the ability of the State to control Defendants was derived from three sources. First, they point out that the State's indirect ownership of the companies provided Israel with the ability to control the Articles of Association, boards of directors and officers of each corporation. (Dead Sea Appendix, Exhs. C and D).

Second, they indicate that the concession and subconcession enactments provided Israel with various rights, including the right to terminate the concession. (Dead Sea Appendix, Exh. E, § 23(b)). The Dead Sea Defendants contend that this right provided control as "[t]ermination of the concession would deprive [Dead Sea and BCL] of their essential raw materials and thus devastate their business purposes, objective and affairs." (Dead Sea Opp., at 22.)

The Dead Sea Defendants also identify the Israeli Government Companies Law as a source of Israel's control over the entities. Dead Sea and BCL were purportedly subject to the Government Companies and Law because they were indirectly owned by the State of Israel. (Dead Sea Opp., at 22.) Under the Government Companies Law, their operations and management were subject to different forms of government control, including the right to approve or disapprove certain decisions made by a government company's Board of Directors. (Dead Sea Appendix, Exh. G, § 11)

The Dead Sea Defendants contend that the State of Israel regularly exercised these powers. For example, the government regularly appointed government employees to serve on the Boards of Directors of Dead Sea and BCL. (Dead Sea Appendix, Exh. H.) The government appointed other government employees to observe meetings held by the Boards of Directors and its committees. (Dead Sea Appendix, Exh. K.) The government required that the companies freeze salaries and wages. (Dead Sea Appendix, Exh. W.) Based upon this information, Defendants contend that throughout the relevant period, Dead Sea and BCL were organs of the State of Israel within the meaning of the FSIA.

The Court does not dispute that the Dead Sea Defendants and the State of Israel maintained a significant relationship. The Court, however, is not convinced that their relationship with the State of Israel is sufficient to raise them to the status of organs of a foreign state.

Dead Sea and BCL are commercial mining operations concerned with production, marketing and profit. (Dead Sea Appendix, Exh. A, Ehrlich Decl., at ¶ 7-8.) The control maintained by the government was derived mainly from the government's indirect ownership of the entities. Any other entity in which the government owned a majority interest would be subject to the same control. (*See* Dead Sea Appendix, Exh G.) Unlike the situations in *Gates* and *Corporacion Mexicana*, the government's control is not derived from the need to play an active supervisory role over a government created entity. *See Gates*, 54 F.3d at 1460-61; *Corporacion Mexicana*, 89 F.3d at 655. Moreover, the entities are not staffed solely with government employees (Dead Sea Appendix, Exh. TT, Ehrlich Depo.

at 125:21-25) and are not treated as agencies under Israeli law.

The Court finds that unlike Alberta Pork and Pemex-Refining, Defendants were independent corporations pursuing a purpose that benefited the government of Israel, but were not created by the government to fulfill a government mission. Consequently, Dead Sea and BCL are not organs of the State of Israel, and cannot be granted foreign state status under the FSIA.

Based on the foregoing, the Court finds that neither Dead Sea nor BCL qualify as an agency or instrumentality of a foreign state under the FSIA. Removal of the action by the Dead Sea Defendants under 28 U.S.C. § 1441(d) was therefore not proper.[5] There is, however, the Supplemental Grounds for Removal filed by Defendant Dole Food Company which may provide grounds for removal. Resolution of Plaintiffs' motion to remand will therefore depend on whether the supplemental grounds of removal were proper.

III. PLAINTIFFS' MOTION FOR REMAND AND IN OPPOSITION TO SUPPLEMENTAL GROUNDS FOR REMOVAL

On November 3, 1997, Defendant Dole Food Company, Inc. filed a timely Supplemental Notice of Removal

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[5] Because the Court finds that neither Dead Sea nor BCL are foreign states under the FSIA and could therefore not remove the action under 28 U.S.C. § 1441(d), it is not necessary to reach Plaintiffs' argument that Dead Sea and BCL were fraudulently joined in the action.

which was consented to by the other defendants. The Supplemental Notice of Removal asserts that federal question jurisdiction and diversity jurisdiction provide supplemental bases for removal.

Defendants assert that the following sources of federal question jurisdiction exist: 1) foreign relations implications; 2) Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 *et. seq.* ("FIFRA") preemption; and 3) violation of a federal court injunction. In addition, Defendants contend that the question of dismissal based on forum non convenions and comity of the nations

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IT IS SO ORDERED.

DATED: Honolulu, Hawaii, September 9, 1998.

/s/ Helen Gillmor
HELEN GILLMOR
United States District Judge